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IN THE

Supreme Court of United States

OCTOBER TERM, 1970

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NO. _____

THE CHICAGO HOUSING AUTHORITY, et al.,
Petitioners,

v.

DOROTHY GAUTREAUX, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No. _____

IN THE

Supreme Court of United States

OCTOBER TERM, 1970

THE CHICAGO HOUSING AUTHORITY, et al.,
Petitioners,

v.

DOROTHY GAUTREAUX, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, the Chicago Housing Authority and its Executive Director, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on December 16, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported, appears in the Appendix hereto at page A-10. The initial opinion of the United States District Court for the Northern District of Illinois, Eastern Division, granting in part respondents' motion for summary judgment, is reported at 296 F.Supp. 907 (1969). The District Court's initial Judgment Order is reported at 304 F.Supp. 739 (1969). The District Court's modification of that Judgment Order on July 20, 1970, which gives rise to the instant proceedings, is unreported and appears in the Appendix hereto at page A-7.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on December 16, 1970. A timely petition for rehearing and suggestion for en banc hearing was denied on February 18, 1971 (A-43), and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Whether the Court of Appeals erred when it sustained an order of the District Court which summarily modified its prior Judgment Order of July 1, 1969, without the due process requirements of notice to the Chicago Housing Authority [CHA] and the opportunity for a hearing, and ordered CHA to present proposed public housing sites to the Chicago City Council on or before certain specific dates.

Whether the Court of Appeals erred in holding that CHA had "waived" the right to notice and a hearing.

Whether the Court of Appeals erred in sustaining the determination by the District Court of a disputed issue of fact in the course of a pretrial conference.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

"[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . ."

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure 16:

> "In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider
>
> (1) The simplification of the issues;

(2) the necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

"The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions."

STATEMENT OF THE CASE

This action was commenced in 1966 when plaintiffs brought suit under 42 U.S.C. §§ 1981, 1983, and 2000d on behalf of themselves and all other tenants in, or applicants for, public housing in the City of Chicago challenging the constitutionality of the procedures whereby the CHA selected sites for public housing projects. The gravamen of the complaint was that the CHA had situated these projects in areas which were largely populated by blacks, thereby perpetuating a system of residential segregation in the city. Of the four counts in the complaint, two were dismissed on motion of the defendants (265 F.Supp.

582, 584 (1967)). Thereafter plaintiffs' motion for summary judgment as to Count I was granted, while a similar motion as to Count II was denied (296 F.Supp. 907 (1969)). After summary judgment was granted for plaintiffs, a Judgment Order was entered on July 1, 1969 (304 F.Supp. 736), from which no appeal was taken by CHA.

In his Memorandum Opinion announcing the granting of summary judgment for the plaintiffs, the District Judge described the underlying controversy as follows:

> "In choosing sites for public housing, the CHA is directed by statute to follow these criteria:
>
> > "[E]limination of unsafe and unsanitary dwellings, the clearing and redevelopment of blighted and slum areas, the assembly of improved and unimproved land for development or redevelopment purposes, the conservation and rehabilitation of existing housing, and the provision of decent, safe, and sanitary housing accomodations [sic]. . . .
>
> "The City Council must approve all sites before they are acquired. . . . However, CHA is not compelled to acquire or build upon all sites thus approved. . . .
>
> "Plaintiffs charge that the procedure mainly used by defendants to maintain existing patterns of racial residential separation involved a pre-clearance arrangement under which CHA informally submitted sites for family housing to the City Council Alderman in whose ward the site was located. CHA admits the existence of this procedure. . . . The Alderman to whom White sites were submitted allegedly vetoed these sites because the 90% Negro waiting list and occupancy rate would create a Negro population in the White Area. Plaintiffs allege that the few White sites which escaped an Alderman's informal veto were rejected on racial grounds by the City Council when they were formally submitted by CHA for approval.
>
> "*Defendants urge that CHA officials never entertained racist attitudes and that 'the racial character of*

the neighborhood has never been a factor in CHA's selection of a suitable site.' . . . In view of CHA's persistent selection of White sites at the initial stage before the pre-clearance procedure and the candor of its officials on deposition, these statements are undoubtedly true. It is also undenied that sites for the projects which have been constructed were chosen primarily to further the praiseworthy and urgent goals of low cost housing and urban renewal. Nevertheless, a deliberate policy to separate the races cannot be justified by the good intentions with which other laudable goals are pursued. . . . It is also true that there is no evidence that the Aldermen who vetoed White sites were necessarily motivated by racial animus when they followed a policy of keeping Negroes out of White neighborhoods. Most Aldermen apparently talked to their constituents and received unfavorable reactions before exercising their informal vetoes. . . . But even if the Aldermen's informal surveys were correct in their uniform assessment of public opinion, they cannot acquiesce in the sentiment of their constituents to keep their neighborhoods White and to deny admission to Negroes via the placement of public housing. . . ." 296 F.Supp. at 909-914 (Emphasis added). (Citations omitted throughout.)

The subsequent Judgment Order, which was entered on July 1, 1969, contained the following provisions designed to correct CHA's procedures which had been found to be unconstitutional:

"VIII. CHA shall affirmatively administer its public housing system in every respect . . . to the end of disestablishing the segregated public housing system which has resulted from CHA's unconstitutional site selection and tenant assignment procedures. Without limiting the foregoing,

"A. CHA shall use its best efforts to increase the supply of Dwelling Units as rapidly as possible in conformity with the provisions of this judgment

> order and shall take all steps necessary to that end, including making applications for allocations of federal funds and carrying out all necessary planning and development. . . ." 304 F.Supp. at 741.

The District Court expressly retained jurisdiction for the "issuance, upon proper notice and motion, of orders modifying or supplementing" the Judgment Order (304 F.Supp. at 741).

Thereafter, in accordance with the directive of the District Court, CHA's staff located and examined approximately 1,500 scattered pieces of property, analyzed them with respect to zoning problems, calculated the numbers of units possible for each location, and prepared estimates of the potential land acquisition costs. CHA made its submittals to the United States Department of Housing and Urban Development (HUD) starting in December, 1969. By May 1, 1970, CHA had received approval from HUD for 263 sites involving approximately 1,580 units. In addition, between April, 1969, and May, 1970, CHA held meetings with various representatives of the Northeastern Illinois Planning Commission, the Cook County Housing Authority, the Northern Illinois Planning Commission, the Illinois Housing Development Authority, and officials of numerous suburban communities in connection with CHA's design to locate some housing projects outside the City of Chicago (A-62-68; 71).

In May of 1970 counsel for the plaintiffs requested information from CHA concerning the efforts which had been made to comply with the Judgment Order of July 1, 1969. These requests for information led to a series of informal meetings between counsel for the respective parties and the District Judge on June 2, 16, and 26, and July 13 and 20, 1970, which were termed "pretrial conferences" by the District Judge (Transcript, July 13, pp.

31-32). During the first three conferences, various CHA representatives made informal, off-the-record statements regarding efforts by CHA to comply with the July 1, 1969 Judgment Order.

Immediately prior to the July 13 conference, counsel for the plaintiffs delivered to the District Judge a letter, together with a draft order, explaining plaintiffs' desire to receive further information from CHA. That letter stated in pertinent part as follows:

> "Unless the best efforts provision of the decree is to be rendered meaningless, we need specific information concerning what CHA has done and plans to do. *Perhaps everything is being done that can be done,* but we cannot know this if we do not have the information. If more should be done than is being done, we cannot make intelligent recommendations to the Court without knowledge.
>
> "Therefore, pursuant to the 'best efforts' provision of the decree, *we ask that CHA be directed to cooperate with us in preparing a factual report for the Court.* Attached is a form of such an order. *We do not necessarily ask, however, that such an order be entered;* we believe that an informal request from you to CHA should suffice.
>
> "I am sorry I have not been able to prepare and deliver this letter earlier. However, it really does nothing more than reduce to writing the oral request we made at our last meeting in your chambers. *Moreover, it should be non-controversial.* Accordingly, I hope it will be possible to act upon our request promptly, if not this morning then shortly thereafter." (A- 80-81, Emphasis added.)

However, at the July 13 conference the District Judge announced his intention summarily to modify the "best efforts" provision of the Judgment Order of July 1, 1969, and to impose specific deadlines for the submission of

prospective housing development sites to the Chicago City Council for its approval. CHA protestetd vigorously and sought to present evidence in opposition the District Court's plan. However, the District Judge refused to grant a continuance requested by CHA for the purpose of presenting expert testimony in support of its position that sites should be developed simultaneously in both the city and suburban areas, a program which was impossible to carry out within the two-month deadline imposed by the District Judge. Dr. Andrew M. Greeley, Program Director of the National Opinion Research Center at the University of Chicago, if permitted to testify, would have stated that he fully endorsed "the policy and program conceived by the CHA Board of Commissioners that the most effective way to carry out the federal order requiring it to build integrated housing is to develop sites simultaneously in the city and the suburbs." Dr. Greeley also held the view that "the choice is not between metropolitan public housing or public housing in Chicago, but rather one between metropolitan public housing or no public housing." (Statement accompanying CHA's Motion to Vacate, (A-46-48).

At the fifth pretrial conference with the District Judge in chambers on July 20, the District Judge formally entered an order modifying the "best efforts" provision of the original July 1, 1969 Judgment Order. Specifically, this amendment, the validity of which is the question now at issue, imposed a timetable for the submission of proposed sites to the Plan Commission and the Chicago City Council for approval. The pertinent portions of this July 20 order are as follows:

> "It having been represented to the Court by the defendant Chicago Housing Authority ("CHA") that CHA presently has a 'reservation' from the United States Department of Housing and Urban Develop-

ment ("HUD") for the provision of 1,500 Dwelling Units (as defined in this Court's judgment order of July 1, 1969); that approximately 260 sites in the General Public Housing Area (as defined in said order of July 1, 1969) have been identified by CHA as appropriate for the construction of an estimated 1,580 Dwelling Units; that said sites have been submitted by CHA to HUD and that the same have been approved by HUD; and that the next steps to be taken by CHA to the end that Dwelling Units may be provided as rapidly as possible in conformity with said order of July 1, 1969, are the referral by CHA of proposed sites to the Chicago Plan Commission pursuant to Chapter 24, § 11-12-4.1, Ill. Rev. Stats. 1969, and advice of the same to the Chicago City Council pursuant to Chapter 67½, § 9, Ill. Rev. Stats. 1969; and

"It appearing to the Court that it is desirable that CHA use its best efforts to increase the supply of Dwelling Units as rapidly as possible as provided in said judgment order;

"It is hereby ordered, pursuant to Subsection A of Article VIII of the Judgment Order entered herein on July 1, 1969, as modified:

* * *

"II. On or prior to August 20, 1970, CHA shall refer to the Chicago Plan Commission pursuant to ch. 24, § 11-12-4.1, Ill. Rev. Stat. 1969, and on or prior to September 20, 1970 CHA shall advise the Chicago City Council pursuant to ch. 67½ § 9, Ill. Rev. Stat. 1969 of, sites appropriate for the construction, in conformity with the provisions of said Judgment Order of July 1, 1969, of not fewer than 1,500 Dwelling Units" (A. 7-9).

On August 11, 1970, CHA filed a motion to vacate the order of July 20 on the grounds that it had been entered without appropriate notice to CHA and an opportunity for a hearing on the issue of a specific timetable; and that this action by the District Judge violated not only the Court's own order of July 1, 1969, which required "proper notice

and motion" and the "presentation of relevant information" prior to modification of the order, but also denied to CHA due process of law. Additionally, CHA urged in its motion to vacate that the District Judge had abused his discretion by unwarranted interference with the necessary decision-making power of CHA concerning the details of how to increase in the most effective manner the supply of housing for low income families as rapidly as possible in conformity with the July 1, 1969 Judgment Order (A- 45).

The motion to vacate was denied on August 13, 1970, and the same grounds were urged on appeal to the Court of Appeals. That Court, by a divided vote, held that CHA had waived the right to formal hearings before the entry of the modification order. The majority conceded that no request was ever proffered by plaintiffs concerning the entry of an order imposing a specific timetable. Nevertheless, concluded the majority, CHA "should have been aware that such an order might be entered." Furthermore, the majority took the position that CHA had had an adequate opportunity to present its views in oral and written form when the CHA Chairman and a Commissioner were present during the third conference which was held on June 26 in the District Judge's chambers.

Judge Kiley, in dissent, concluded that the record showed that the five conferences with the District Judge were conducted for the purpose of obtaining information concerning CHA's progress in implementing the "best efforts" provision of the July 1, 1969, Judgment Order, that CHA consequently had no adequate notice that the terms of the Judgment Order would be drastically and summarily modified. Furthermore, the dissenting judge would have held that any prior written submissions to the District Judge from the CHA Chairman and commissioner were not an adequate substitute for a full hearing, at which time CHA could present the testimony of expert witnesses, as

it had requested, and other data in support of its position that an order requiring precipitant action on its part would jeopardize the Chicago public housing program and the goals outlined in the District Court's original July 1, 1969, Judgment Order.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals Sanctions Procedures Which So Far Depart From the Accepted and Usual Course of Judicial Proceedings as to Call For Supervision by This Court.

The decision of the Court of Appeals in the instant case sanctioned a course of action whereby the District Court, without affording CHA appropriate notice and the opportunity for a hearing, summarily modified the Court's original Judgment Order and imposed a specific timetable for the submission of proposed sites to the Chicago City Council. The record in this case shows unequivocally that the subject matter of the informal conferences with the District Judge was the steps which CHA was taking to effectuate the provisions of the original Judgment Order. Thus, plaintiffs, on May 18, 1970, wrote to CHA, requesting, among other things, the following:

> "Any other documents which may evidence the action so far taken by CHA to comply with the subsection A of Section VIII of the judgment order entered July 1, 1969 (the 'best efforts' provisions), including particularly any contractual or other written arrangements which have been entered into by CHA with respect to the siting of public housing in areas outside the City of Chicago" (A- 57).

In response, counsel for CHA on May 25, 1970, set forth her understanding of the subject matter of the conferences:

> "Your inquiry as to what action CHA has taken to comply with the 'best efforts' provision of the order

requires an extensive response. We will be prepared to respond fully on June 2nd in Judge Austin's chambers." (A- 60).

Furthermore, on July 13, 1970—the very day the District Judge announced his intention to impose a timetable—plaintiffs informed the Court and CHA by letter that they were only seeking information from CHA and that their request that the information be supplied would certainly be non-controversial (p. 7, *supra;* A-79-81). The draft order submitted with this letter required only that CHA prepare a factual report and file it with the District Court (A-81-83). And, by agreement, such a report was filed with the court, under seal, on August 14, 1970. However, nowhere in plaintiffs' July 13 letter, or in the draft order attached to it, or, indeed, in the entire record of this case, is there any indication that plaintiffs were seeking a modification of the July 1969 Judgment Order. The intention of the District Judge to impose deadlines was first articulated at the July 13, 1970 conference. All that followed at the July 20 conference was discussion as to the form of the order.

Thus, the record demonstrates more than a mere lack of notice. CHA engaged in "pretrial conferences" with notice that the subject of discussion would be its activities since the July, 1969 Judgment Order; but suddenly, on July 13, the District Court transformed an essentially non-controversial proceeding into a controversial one by directing a material change in the order of July 1, 1969, and imposing specific deadlines upon the submissions by CHA to the Chicago City Council.

Furthermore, CHA had no hearing on the crucial issue of whether a timetable should be imposed. To be sure, representatives of CHA had made informal, off-the-record statements during the first four conferences with the District

Judge describing CHA's efforts to comply with the July 1, 1969 order. At the critical July 13 conference, CHA offered to bring in an outside expert to discuss the rationale of CHA's efforts, but the Court declined to hear this expert, believing that his views would be a reiteration of those previously expressed by the CHA representatives (Transcript, August 13, p. 4). These informal statements could hardly be characterized as a hearing on the question of whether the original Judgment Order should have been modified, particularly in view of the facts that such statements were made in response to plaintiffs' request for information from CHA and the District Judge did not announce his intention to impose a timetable until the July 13 conference.

This Court has frequently emphasized the importance of procedural rights, for, as the Court recently stated, it is "procedure that works much of the difference between rule by law and rule by fiat." *Wisconsin* v. *Constantineau,* 91 S.Ct. 507, 509 (1971). At a minimum, procedural due process requires appropriate notice and an opportunity to be heard. See, e.g., *Goldberg* v. *Kelly,* 397 U.S. 254 (1970). Indeed, "[t]he fundamental requisite of due process of law is the opportunity to be heard," *Grannis* v. *Ordean,* 234 U.S. 385, 394 (1914), and the hearing must be " granted at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965).

In the present case, these basic requirements of due process guaranteed by the Fifth Amendment to the United States Constitution—notice and a hearing—were not afforded to CHA. CHA had no opportunity, in a meaningful manner and at a meaningful time, to present its views to the District Judge concerning the most effective manner in which to carry out the District Court's July, 1969 Order. That the District Court should engage in, and the Court of Appeals should sanction, such a broad departure from the principles which have been constantly reiterated by this

Court is all the more critical in the instant case because of the great importance of the public housing program to the community, not only in Chicago but throughout the country, and the delicate nature of those decisions which must be made by CHA and other similar authorities concerning the details of the housing program which may have highly sensitive racial overtones. The District Court in the present case chose to intrude by fiat into the fine details of CHA's procedures, an action which may well have far-reaching adverse consequences for the entire public housing program in the city. At least, the District Court should have been fully and completely informed with respect to CHA's views concerning the consequences if an arbitrary timetable were imposed upon its activities. Instead, the District Court summarily imposed a timetable without notice and without an adequate opportunity for CHA to present evidence in opposition to this precipitant action.

2. The Decision of the Court of Appeals Conflicts With the Applicable Decisions of this Court and Other Courts of Appeals in Its Conclusion That CHA Had "Waived" Its Rights to Notice and a Hearing.

The Court of Appeals did not dispute CHA's contention that it was entitled to appropriate notice and a hearing prior to a modification of the July, 1969 Judgment Order. Rather, the Court held, without citation of authority, that CHA had "waived" any right to notice and a hearing by its participation in the pretrial conferences on an informal basis.

To be sure, CHA did agree to participate in what the District Judge accurately described as "pretrial conferences" (Transcript, July 13, pp. 31-32). CHA further agreed that these conferences would be held in the District Judge's chambers, that they would not be transcribed by a

court reporter, and that they would be unrestricted as to the scope of the discussions. The fundamental error of the majority of the Court of Appeals, however, lies in their insistence that CHA's acquiescence in certain ground rules for the conduct of the preliminary proceedings also constituted a waiver of substantial rights relating to a totally different matter, that is, the right to notice and a hearing before the merits of the controversy concerning a specific timetable were finally determined. As stated by Judge Kiley in his dissenting opinion,

> "the concurrence of both parties in the proceedings before the district court constituted a waiver of CHA's right to complain of lack of 'formal and open' hearings and a transcript. But I do not see how an agreement to have informal hearings without a reporter on one matter can constitute a waiver of the right to notice of a hearing on another matter. The scant record before us indicates that the purpose of the five informal 'conferences' was to obtain information from CHA concerning what action it had taken to conform with the 'best efforts' provision of the July 1, 1969 judgment. . . . My conclusion therefore is that CHA was denied the 'proper notice and hearing,' required by the 1969 judgment, with respect to a specific timetable." (A-22-23, 25)

This Court has uniformly set high standards of proof to establish the waiver of substantial rights. Thus, for example, the Court stated in *Brookhart* v. *Janis,* 384 U.S. 1, 4 (1966), that

> "[t]here is a presumption against the waiver of constitutional rights, see, e.g., *Glasser* v. *United States,* 315 U.S. 60, 70-71, and for a waiver to be effective it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege.' *Johnson* v. *Zerbst,* 304 U.S. 458, 464."

The same principles have been reiterated in countless opinions of the Courts of Appeals. E.g., *United States* v. *Stout*, 415 F.2d 1190, 1192-1193 (4 Cir. 1969); *Dalton* v. *LeBlanc*, 350 F.2d 95, 98 (10 Cir. 965); *Williams* v. *Alabama*, 341 F.2d 777, 780-781 (5th Cir. 1965); *Peterson* v. *S.S. Wahcondah*, 331 F.2d 44, 48 (5th Cir. 1964); *United States* v. *Chichester*, 312 F.2d 275, 283 (9th Cir. 1963).

Identical standards to determine the validity of an alleged waiver have been applied in civil, as well as criminal cases, with respect to both constitutional and non-constitutional rights. As the Court of Appeals stated in *Williams v. Alabama, supra*, "A waiver, *in any kind of a case*, is an intentional relinquishment of an *existing* right." (Former emphasis added.) Thus, in *United States* v. *Chichester, supra*, the Court of Appeals for the Ninth Circuit held that the Government had not waived its right to terminate a contract for the contractor's default in making deliveries within a specified time by accepting less than the contractually prescribed number of articles per month for several months. With respect to the waiver concept, the Court stated that the following criteria were required to constitute an effective waiver:

> "[A]s minimum requirements to constitute an implied waiver of substantial rights, the conduct relied upon must be *clear, decisive and unequivocal* showing a purpose to waive the legal rights involved before such conduct constitutes a waiver." 312 F.2d at 283. (Emphasis added.)

To the same effect, see, e.g., *Peterson* v. *S.S. Wahcondah, supra* (no waiver of seaman's right to penalty wages); *Miravalle Supply Co.* v. *El Campo Rice Milling Co.*, 181 F.2d 679 (8 Cir. 1950) (no waiver of contractual right to discount for prompt payment).

Since conduct must be clear, decisive, and unequivocal in order to constitute a waiver of substantial rights, both

this Court and various Courts of Appeals have found, in many diverse factual circumstances, that the prerequisites for a valid waiver were not existent because the party's actions did not clearly evidence an intention to forego his rights. See, e.g., *Olberding* v. *Illinois Central R.R. Co.*, 346 U.S. 338 (1953) (driving on state highways does not waive federal venue rights); *Schnell* v. *Peter Eckrich & Sons*, 365 U.S. 260 (1961) (defense of customer in patent infringement suit does not subject party to local jurisdiction or waive federal venue requirements); *Alder* v. *Garcia*, 324 F.2d 483 (10 Cir. 1963) (undertaking defense of another does not constitute general appearance).

A logical corollary of the concept of waiver as an intentional relinquishment of a known right requiring clear and unequivocal conduct for its validity is that a waiver of one right cannot constitute the waiver of a totally independent right. This was the holding of the Court of Appeals for the District of Columbia in *Van Bourg* v. *Nitze*, 388 F.2d 557 (D.C. Cir. 1967):

> "'A waiver in any kind of a case, is an intentional relinquishment of an existing right.' *Williams* v. *Alabama*, 341 F.2d 777, 779 (5th Cir. 1965). . . . Whatever procedural rights appellant might have waived in 1951 could not afford a basis for depriving him of the procedural rights he was entitled to before the Review Board in 1963. In light of the request he made before the Review Board for an opportunity to examine any confidential reports which might be relied upon, we cannot say that appellant waived the rights afforded him by Naval regulation. Cf. Simmons v. United States, 348 U.S. 397, 75 S.Ct. 397, 99 L. ed. 453 (1955)." 388 F.2d at 565.

Indeed, even the Court of Appeals for the Seventh Circuit has recognized that the waiver of one right cannot properly be extended to encompass the waiver of a totally different right. Thus, in *Buffum* v. *Chase Nat. Bank*, 192 F.2d 58 (7th Cir. 1951), cert. den., 342 U.S. 944 (1952), the

issue was whether the defendant, by qualifying in Illinois for the limited purpose of engaging in trust business, waived its right not to be sued in Illinois except with respect to matters connected with its trust business. In holding that there had been no waiver, the Court stated as follows:

> "[Waiver] may be expressed formally or it may be implied as a necessary consequence of the waiver's conduct inconsistent with an assertion or retention of the right. It must be proved by the party relying upon it. And if the only proof of intention to waive rests on what a party does nor forbears to do, his act or omissions to act should be so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of his conduct is possible." 192 F.2d at 61.

The Court of Appeals in *Buffum* concluded that it would not "attribute to [the defendant] an intent to waive anything other than what it did actually waive . . ." 192 F.2d at 61. Yet the majority in the instant case attribute to CHA an intent to waive its right to a hearing on a fundamental modification of the July, 1969 Judgment Order merely because CHA had agreed to participate in informal conferences concerning its efforts to comply with that Judgment Order. Indeed, waiver was found as to the disputed timetable issue despite the fact that from the moment the District Court on July 13 first proposed the drastic modification of its Judgment Order CHA objected and sought to bring in a witness; and, after the modification imposing a timetable was formally entered on July 20, CHA promptly moved for a vacation of that order and again sought a hearing. Thus, CHA's conduct positively refutes the notion that it intended to waive notice and a hearing on the question the modification of the Judgment Order to impose a specific timetable. The decision of the Court of Appeals finding a waiver in the face of CHA's vigorous protests is, therefore, blatantly inconsistent with a long line of deci-

sions, both in this Court and the Court of Appeals, which hold that a waiver of substantial rights must be a voluntary and intentional relinquishment of those rights, and the validity of which must be established by clear, decisive, and unequivocal evidence.

3. The Decision of the Court of Appeals Conflicts With the Applicable Decisions of This Court and Other Courts of Appeals in Its Sustaining of the District Court's Summary Determination of a Disputed Issue of Fact During a Pretrial Conference.

The District Judge correctly described the June 2, 16, and 26, and July 13 meetings in chambers with counsel for plaintiffs and CHA as "pretrial conferences" (Transcript, July 13, pp. 31-32). Such conferences are held for the purposes of the "simplication of issues" and the production of an order which, among other things, will reflect

> "agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel." Rule 16, Fed. R. Civ. Pro.

Yet the District Judge, during the July 13 conference, summarily modified his July, 1969 Judgment Order to impose a specific timetable in the face of vigorous protests from CHA that it desired to present evidence in support of its position on the timetable question. In effect, the District Court granted a summary judgment for plaintiffs despite the existence of critical issues of fact concerning the necessity, propriety, and advisability of imposing a specific timetable, issues concerning which CHA sought in vain to have the District Court receive testimony.

Only last Term in *Adickes* v. *Kress & Co.*, 398 U.S. 144 (1970), this Court reiterated its often-stated view that summary procedures may not properly be employed to re-

solve disputed issues of fact. This is particularly true where the underlying issues involved of ones of widespread importance, for, as this Court has noted, "summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import." *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256-257 (1948). As stated by this Court in *Poller* v. *Columbia Broadcasting System*, 386 U.S. 464, 467 (1962),

> "Summary judgment should be entered only when the pleadings, despositions, affidavits, and admissions filed in the case 'show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Rule 56(c), Fed. Rules Civ. Proc. This rule authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and] [where] no genuine issue remains for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.' *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944)."

Nevertheless, in spite of the repeated admonitions by this Court concerning the summary disposition of disputed factual issues, particularly in cases involving "issues of far-flung import," the Court of Appeals in the present case endorsed the District Court's summary resolution of the disputed issues of fact concerning the imposition of a specific timetable.

Furthermore, the abuse of the pretrial procedure to permit the determination of a disputed question was approved by the Court of Appeals, a position which is squarely in conflict with that adopted in other circuits. That the principal purpose of a pretrial conference is to simplify and define disputed issues has often been reiterated. E.g., *Ely* v. *Reading Co.*, 424 F.2d 758, 763 (3 Cir. 1970); *Mull* v.

Ford Motor Co., 368 F.2d 713, 716 (2 Cir. 1966). But Courts of Appeals, apart from the Seventh Circuit, have consistently held that informal preliminary procedures may not be employed to resolve disputed factual issues. Thus the Third Circuit Court of Appeals has noted that "pre-trial proceedings are intended to determine what the issues are, and not to invade the trial function of resolving those issues." *Reynolds Metals Co.* v. *Metals Disintegrating Co.*, 176 F.2d 90, 92 (3 Cir. 1949).

Similarly, in *Lynn* v. *Smith*, 281 F.2d 501 (3 Cir. 1960), the Third Circuit held that the District Court had erred in dismissing the complaint, *sua sponte*, at the conclusion of a pretrial conference. In reversing, the Court of Appeals stated the following:

> "What the District Court did, in effect, was to grant a summary judgment although neither party had moved for a summary judgment nor had they taken any steps in that direction in accordance with the specific requirements of Rules 12(b) and 56(c) of the Federal Rules of Civil Procedure, 28 U.S.C.
>
> "The appellate tribunals in the federal judicial system have frequently pointed out to trial courts that *** summary judgments cannot be granted when there is a genuine issue as to a material fact presented by either of the parties to an action. Bragen v. Hudson News Company, Inc., 3 Cir. 1960, 278 F.2d 615; Krieger v. Ownership Corporation, 3 Cir., 1959, 270 F.2d 265; Alaniz v. United States, 10 Cir., 1958, 257 F.2d 108; Cameron v. Vancouver Plywood Corporation, 9 Cir., 1959, 266 F.2d 535.
>
> *"Further, we are compelled to observe that pretrial conferences are not intended, nor have they ever been, to serve as a substitute for the regular trial of cases.* 281 F.2d at 506. (Emphasis added.)

What happened to the plaintiff in *Lynn* v. *Smith* happened to CHA in the District Court, that is, despite the

existence of a genuine issue of material fact, at the conclusion of a pretrial conference an order summarily adjudicating the controversy was entered without notice or hearing. This action violated not only the principle of due process and the text of the 1969 Judgment Order, but also the rules for pretrial conferences and summary judgments.

Other courts of appeals have taken a view similar to that of the Third Circuit concerning the proper scope and function of informal preliminary proceedings. In *Clay* v. *Callaway*, 177 F.2d 741, modified on other grounds, 178 F.2d 758 (5 Cir. 1949), the plaintiff alleged that he had been discharged by his employer without a fair and impartial investigation as required by his union's contract with the employer. During the course of a pretrial conference, the District Judge, over plaintiff's protest, considered a report of the investigation, made factual findings, concluded that the investigation had not been unfair, and thereupon ordered that the complaint be dismissed. The Court of Appeals, noting that the plaintiff might have been able to produce evidence at trial in addition to that contained in the investigation report, reversed the judgment of dismissal and commented as follows concerning the scope of preliminary proceedings:

> "The [district] judge states that the meeting was only a conference, not a trial. The scope of a pretrial conference is stated in Federal Rule of Civil Procedure 16, 28 U.S.C.A., and does not include the making of a final judgment." 177 F.2d at 743.

The Tenth Circuit Court of Appeals adopted an identical position in *Lynch* v. *Call*, 261 F.2d 130 (10 Cir. 1958). That case involved an action against a United States marshal for the wrongful attachment of certain equipment. The District Court, after a pretrial conference, granted summary judgment against the marshal but awarded only nominal dam-

ages on the theory that the plaintiff had refused to accept possession of the property subject to the attachment and thereby to fulfill his obligation to mitigate his damages. The Court of Appeals reversed, holding that the factual question of whether plaintiff could have rented the equipment subject to the attachment could not be resolved in preliminary proceedings. The Court stated:

> "The salutary, indeed the desirable and efficacious, purpose of a pretrial conference is to sift the discovered and discoverable facts to determine the triable issues, both factual and legal, and to chart the course of the lawsuit accordingly . . . [W]here, as here, a genuine issue of fact emerges from the discovery and the conferences, the court is of course powerless to summarily resolve it. Alaniz v. United States, 10 Cir., 257 F.2d 108." 261 F.2d at 132.

Thus, the decision of the Court of Appeals in the instant case, upholding the summary disposition of disputed factual issues by the District Court, is directly in conflict with the principles announced by this Court concerning the impermissibility of using summary procedures to resolve factual questions, and with those decisions of other courts of appeals with respect to the proper scope and function of informal, preliminary proceedings.

CONCLUSION

For the above reasons a writ of certiorari should be issued to review the judgment and opinion of the Seventh Circuit.

Respectfully Submitted,

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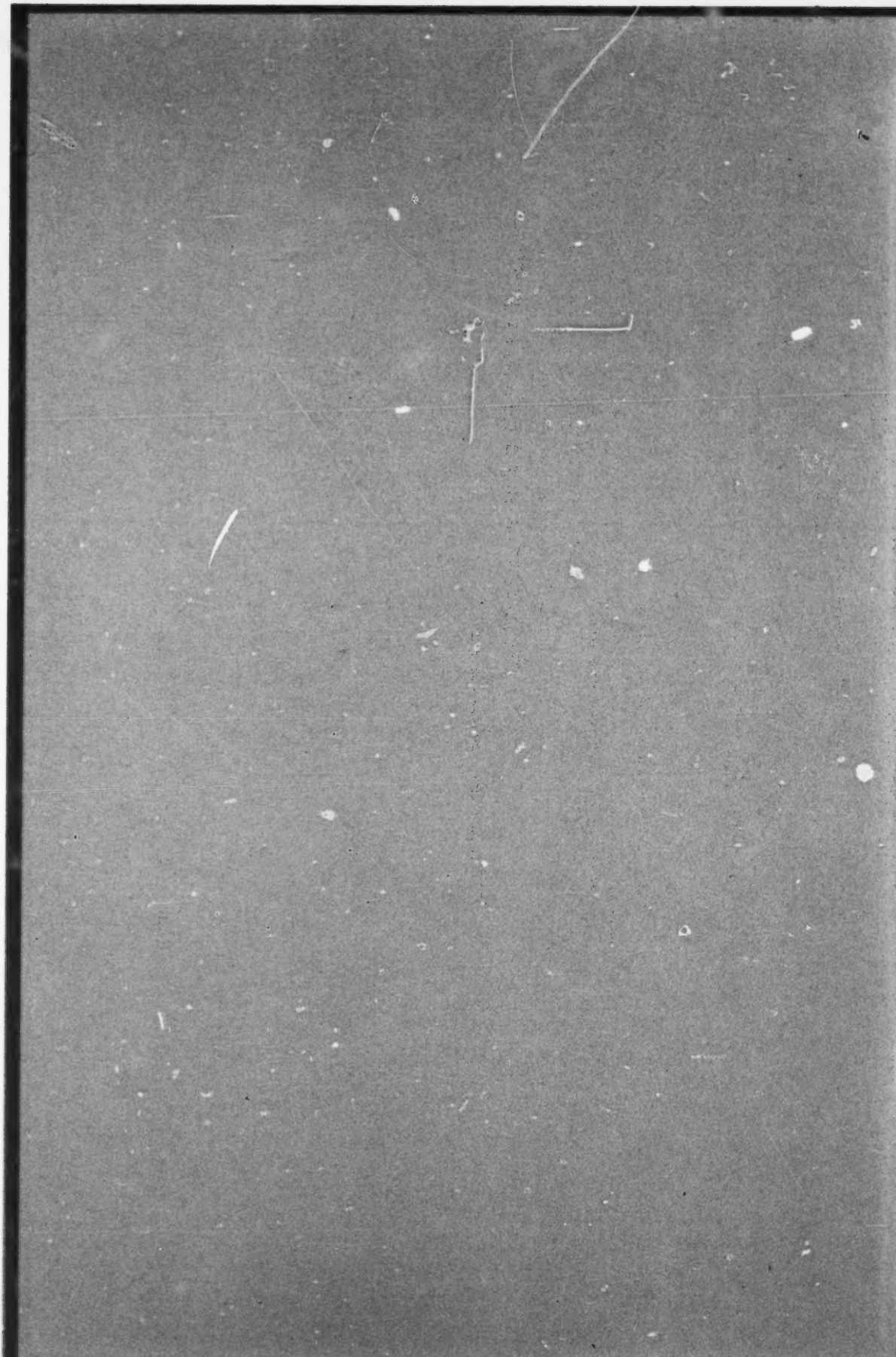
APPENDIX



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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

DOROTHY GAUTREAUX, ODELL JONES, DOREATHA R. CRENCHAW, EVA RODGERS, JAMES RODGERS, ROBERT M. FAIRFAX and JIMMIE JONES, **Plaintiffs,** **v.** **THE CHICAGO HOUSING AUTHORITY, a corporation, and C. E. HUMPHREY, Executive Director,** **Defendants.**	**Civil Action** **No. 66 C 1459**

JUDGMENT ORDER

(Entered July 1, 1969)

This matter coming on to be heard pursuant to this Court's Memorandum Opinion of February 10, 1969, and Orders entered on such date denying defendants' motions for summary judgment, denying plaintiffs' motion for summary judgment as to Count II of the Complaint, and granting plaintiffs' motion for summary judgment as to Count I of the Complaint, and

The Court having conferred with counsel for the parties and having determined that the several provisions of this judgment order are necessary to prohibit the future use and to remedy the past effects of the defendant Chicago Housing Authority's unconstitutional site selection and tenant assignment procedures, to the end that plaintiffs and the class of persons represented by them, Negro tenants of and applicants for public housing in Chicago, shall have the full equitable relief to which they are entitled,

It is hereby ordered:

I. For purposes of this judgment order,

A. "CHA" shall mean the defendant, Chicago Housing Authority.

B. "Dwelling Unit" shall mean an apartment or single family residence which is to be initially made available to and occupied by a low-income, non-elderly family, subsequent to the date hereof, directly or indirectly by or through CHA, whether in a structure owned in whole or in part by CHA (whether or not newly constructed) or to be otherwise made available for occupancy by or through CHA to such a family. "Dwelling Units" include "Leased Dwelling Units" as hereinafter defined.

C. "Leased Dwelling Unit" shall mean a Dwelling Unit in a structure leased or partially leased by CHA from any person, firm or corporation.

D. "Limited Public Housing Area" shall mean that part of the County of Cook in the State of Illinois which lies either within census tracts of the United States Bureau of the Census having 30% or more non-white population, or within a distance of one mile from any point on the outer perimeter of any such census tract. "General Public Housing Area" shall mean the remaining of the County of Cook in the State of Illinois. The terms "non-white" and "white" shall have the meaning given to such terms by the United States Bureau of the Census.

* * *

III. Following the date of this judgment order CHA shall provide Dwelling Units as follows, and not otherwise:

A. The following Dwelling Units may be made available for occupancy without restriction imposed by this order:

(1) The 1458 Dwelling Units provided for by pending CHA projects Ill. 2-27, 2-28 (exclusive of

Dwelling Units proposed to be located at 70th and Harper streets in the City of Chicago), 2-32, 2-33, 2-51, 2-64, 2-69 and 2-74.

(2) Leased Dwelling Units (but not more than two per structure) which have been occupied for at least six months prior to CHA's leasing the same by tenants who continue in occupancy following CHA's leasing thereof.

B. CHA shall not commence or cause to be commenced the construction of any Dwelling Units, other than said 1458 Dwelling Units referred to in Subsection A of this Article III, until CHA shall have commenced or caused to be commenced, and shall be continuing or shall have completed, the construction of not less than 700 Dwelling Units located in the General Public Housing Area of the City of Chicago.

C. Subject to the provisions of Subsection E of this Article III, CHA shall not commence or cause to be commenced the construction of any Dwelling Units in any Limited Public Housing Area, other than said 1458 Dwelling Units referred to in Subsection A of this Article III, unless within three months following such commencement of construction at least 75% of the Dwelling Units on which CHA shall have commenced or caused to have commenced construction, and shall have continued or completed construction, since the commencement of construction of the last of the 700 Dwelling Units referred to in subsection B of this Article III shall have been located (at the time of commencement of construction thereof) in the General Public Housing Area of the City of Chicago.

* * *

E. Not more than 33⅓% of the Dwelling Units required by subsection C of this Article III to be located in the General Public Housing Area of the City of Chicago, and not more than 33⅓% of the Leased Dwelling Units required by subsection D of this Article III to be located in the General Public Housing Area

of the City of Chicago, may, at the option of CHA, be planned for and located in the General Public Housing Area of the County of Cook in the State of Illinois, outside of the City of Chicago, provided that (whether or not constructed by CHA) the same are made available for occupancy by CHA to, and are occupied by, residents of the City of Chicago who have applied for housing to CHA, and provided further that all such Dwelling Units comply with the provisions of Article IV of this order.

* * *

VII. Following the date of this judgment order CHA shall file with the Court and serve upon counsel for the plaintiffs, the Civil Rights Division of the United States Department of Justice, and the Regional Administrator of the Department of Housing and Urban Development, the following:

A. A statement of the following information respecting each location for one or more Dwelling Units, such statement to be filed and served not more than 10 days after any such location is approved by the Board of Commissioners of CHA (or by the appropriate CHA officer or employee with respect to any location not required to be approved by the Board of Commissioners) and prior to the formal submission thereof to any other government agency or official for consideration or action:

(1) a map showing boundaries, placement in relation to adjacent streets and, where available, street address;

(2) the area location (whether within the Limited or General Public Housing Area);

(3) the census tract number;

(4) the white and non-white population of such census tract;

(5) the aggregate number of apartments and single family residences theretofore made avail-

able to low-income, non-elderly families, directly or indirectly by or through CHA in such census tract;

(6) the aggregate number of apartments and single family residences in such census tract as reflected by the most recent census taken by the United States Bureau of the Census, supplemented by such information with respect thereto as is available to CHA from any other government agency or official (but the statement need not include such number if the number supplied with respect to the preceding paragraph (5) is zero);

(7) the total number of Dwelling Units proposed to be provided at such location;

(8) the number of structures, and the number of Dwelling Units in each, in which such Dwelling Units are proposed to be provided; and

(9) such additional data as will show that such proposed Dwelling Units will be made available for occupancy in conformity with the provisions of Article III and IV hereof, including without limitation, in the event such proposed Dwelling Units would result in a Public Housing Project designed for occupancy by more than 120 persons, information showing that the provisions of subsection A of Article IV hereof have been met with respect to such Public Housing Project.

B. Statements setting forth any change in the information included under paragraphs (1), (2), (3), (5), (7), (8) or (9) in a statement filed and served pursuant to subsection A of this Article VII, and covering the period up to initial occupancy of all Dwelling Units at any location, such statements to be filed and served not more than 10 days after any such change occurs.

C. Statements covering the periods from the date hereof until December 31, 1969, and from the date hereof until the end of each calendar semiannual

period thereafter, containing such data as will show that (1) all plans for Dwelling Units during the period covered by such statements have been in conformity with the provisions of Article II hereof, and (2) all Dwelling Units provided during the period covered by such statements have been in conformity with the provisions of Articles III and IV hereof, such statements to be filed and served not more than twenty days after the end of each calendar semi-annual period beginning with such period ended December 31, 1969.

VIII. CHA shall affirmatively administer its public housing system in every respect (whether or not covered by specific provision of this judgment order) to the end of disestablishing the segregated public housing system which has resulted from CHA's unconstitutional site selection and tenant assignment procedures. Without limiting the foregoing,

A. CHA shall use its best efforts to increase the supply of Dwelling Units as rapidly as possible in conformity with the provisions of this judgment order and shall take all steps necessary to that end, including making applications for allocations of federal funds and carrying out all necessary planning and development; and

B. CHA is hereby permanently enjoined from invidious discrimination on the basis of race in the conduct or operation of its public housing system, including without limitation the "pre-clearance procedure" described in the Court's Memorandum Opinion of February 10, 1969.

IX. This order shall be binding upon CHA, its officers, agents, servants, employees, attorneys, and their successors, and upon those persons, including the members of the City Council of the City of Chicago, in active concert or participation with them who receive actual notice of this order by personal service or otherwise.

X. This Court retains jurisdiction of this matter for all purposes, including enforcement and the issuance, upon proper notice and motion, of orders modifying or supplementing the terms of this order upon the presentation of relevant information with respect to proposed developments designed by CHA alone or in combination with other private or public agencies to achieve results consistent with this order, material changes in conditions existing at the time of this order, or any other matter.

XI. The costs of this action shall be taxed against CHA, subject to the further order of this Court.

Enter:

.....

Judge, United States District Court

DATED: July 1, 1969

[Caption Omitted]

ORDER

(Entered July 20, 1970)

This matter coming on to be heard on the presentations of the parties, and

It having been represented to the Court by the defendant Chicago Housing Authority ("CHA") that CHA presently has a "reservation" from the United States Department of Housing and Urban Development ("HUD") for the provision of 1,500 Dwelling Units (as defined in this Court's judgment order of July 1, 1969); that approximately 260 site in the General Public Housing Area (as defined in said order of July 1, 1969) have been identified by CHA as appropriate for the construction of an estimated 1,580 Dwelling Units; that said sites have been submitted by CHA to HUD and that the same have been approved by HUD; and that the next steps to be taken by CHA to the end that Dwelling Units may be provided as rapidly as

possible in conformity with said order of July 1, 1969, are the referral by CHA of proposed sites to the Chicago Plan Commission pursuant to Chapter 24, § 11-12-4.1, Ill. Rev. Stats. 1969, and advice of the same to the Chicago City Council pursuant to Chapter 67½, § 9, Ill. Rev. Stats. 1969; and

It appearing to the Court that it is desirable that CHA use its best efforts to increase the supply of Dwelling Units as rapidly as possible as provided in said judgment order;

It is hereby ordered, pursuant to Subsection A of Article VIII of the Judgment Order entered herein on July 1, 1969, as modified:

I. On or prior to August 14, 1970, CHA shall submit to the Court a written Report setting forth the action taken and to be taken by it to comply with said Subsection, which Report shall include detailed information concerning, but need not be limited to, the following:

A. *Action taken prior to the date of Report respecting,*

1. Identification (in any appropriate manner) of sites for Dwelling Units which do not require zoning changes.

2. Identification (in any appropriate manner) of sites for Dwelling Units which require zoning changes, and action taken, if any, to secure such changes.

3. Employment, if any, of the "turnkey" method or any variation thereof of supplying Dwelling Units.

4. Agreements with other official bodies, including other housing authorities, to increase the supply of Dwelling Units.

5. Proposals, requests, etc., if any, submitted by CHA to the Department of Housing and Urban Development for additional "reservations" for

Dwelling Units, or relating to other action designed to increase the supply of Dwelling Units.

B. *Future Plans*

A detailed statement, including information in the categories listed under "A" above, of the number of Dwelling Units to be provided, and the anticipated locations thereof, over the 12, 24 and 36 month periods following the date of the Report, including a statement as to how such provision of Dwelling Units is to be achieved.

To the extent the future plans referred to under "B" above have not been prepared, CHA shall promptly prepare the same.

CHA shall confer with counsel for the plaintiffs during the preparation of such Report and make full disclosure to them of all matters necessary or appropriate to the preparation of the same to the end that such Report shall be as comprehensive and detailed as possible and shall constitute a statement respecting the matters to be covered thereby which has been agreed to by the parties. Any issues of privilege or confidentiality shall be promptly submitted to the Court for resolution to the extent the parties are unable to settle the same among themselves.

II. On or prior to August 20, 1970, CHA shall refer to the Chicago Plan Commission pursuant to ch. 24, § 11-12-4.1, Ill. Rev. Stat. 1969, and on or prior to September 20, 1970 CHA shall advise the Chicago City Council pursuant to ch. 67½, § 9, Ill. Rev. Stat. 1969 of, sites appropriate for the construction, in conformity with the provisions of said Judgment Order of July 1, 1969, of not fewer than 1,500 Dwelling Units.

ENTER:

.....

Judge, United States District Court

July 20, 1970.

[Caption omitted]

December 16, 1970

Before DUFFY, *Senior Circuit Judge,* KILEY and PELL, *Circuit Judges.*

DUFFY, *Senior Circuit Judge.* This suit was commenced in 1966. All of the plaintiffs are Negroes and are either tenants or applicants for public housing. They challenged upon behalf of themselves and the members of their class, the constitutional validity of the site selection policy of the Chicago Housing Authority (CHA).

Plaintiffs' complaint contained four counts. Count I alleged that defendants intentionally chose sites for family public housing and adopted tenant assignment procedures in violation of Title 42, §§ 1983 and 1985 for the purpose of maintaining existing patterns of residential separation of races in the City of Chicago. Count III alleged that regardless of their intent, defendants violated Title 42 U.S.C. § 1983 and § 1985 by failing to select sites for public housing in a manner which would alleviate existing patterns of racial separation. Counts II and IV repeated the allegations of Counts I and III respectively, but demanded relief under Title 42 U.S.C. § 2000 d (Section 601 of Title VI of the Civil Rights Act of 1964).

On March 2, 1967, defendants' motion to dismiss Counts III and IV of the complaint was granted, but a similar motion to dismiss Counts I and II was denied. *Gautreaux* v. *Chicago Housing Authority,* 265 F. Supp. 582. No appeal was taken from that decision.

Between March 2, 1967 and February 10, 1969, both parties submitted much evidence in the form of deposi-

tions, affidavits and exhibits to support their respective positions on the merits of the Constitutional issues. On February 10, 1969, both sides moved for summary jv lgment.

On February 20, 1969, the District Court granted defendants' motion for summary judgment as to Count II, dismissing that Count of plaintiffs' complaint. At the same time, in a memorandum opinion, the Court granted plaintiffs' motion for summary judgment on Count I of the complaint. *Gautreaux* v. *Chicago Housing Authority,* 296 F. Supp. 907.

In its opinion, the Court found that while defendant CHA did not necessarily harbor a subjectively racist attitude, it had intentionally maintained a system of public housing which discriminated on racial grounds with respect to the selection of sites for public housing in the City of Chicago, and with respect to tenant assignments within the public housing system. Among the practices specifically cited by the Court as pointing to discrimination on the basis of race was a "pre-clearance" procedure whereby any proposed site for public housing was informally submitted to the alderman of the ward in which the housing project was to be located before the formal procedure of submitting the site to the Chicago Plan Commission and the Chicago City Council was initiated.

It was not disputed that the aldermen to whom proposed sites were submitted for "pre-clearance" vetoed these sites because the 90% Negro waiting list and occupancy rate would create a concentrated Negro population in the White area. The Court further pointed out that the few sites which escaped the aldermen's informal veto were rejected by the City Council on racial grounds. It seems to be conceded that most of the aldermen who vetoed proposed White sites did so because of the unfavorable reaction thereto by residents of their ward.

On July 1, 1969, in accordance with the February 20th opinion and after conferences with both parties at which time comprehensive plans were submitted, the District Judge entered a Judgment Order granting equitable relief to plaintiffs, *Gautreaux* v. *Chicago Housing Authority,* 304 F. Supp. 736. Defendants were ordered to build a certain percentage of all public housing thereafter erected in Chicago, in the "General Housing" areas of that city. The "General Housing" area was synonymous roughly with the predominantly White areas. Defendants were ordered further to submit certain reports to the United States Department of Justice and to the District Court. Paragraph VIII, the modification of which is the subject of this appeal, provided, in relevant part:

> "CHA shall affirmatively administer its public housing system in every respect (whether or not covered by specific provision of this order) to the end of disestablishing the segregated public housing system which has resulted from CHA's unconstitutional site selection and tenant assignment procedures. Without limiting the foregoing,
>
> > A. CHA shall use its best efforts to increase the supply of Dwelling Units as rapidly as possible in conformity with the provisions of this judgment order and shall take all steps necessary to that end, including making applications for allocations of federal funds and carrying out all necessary planning and development. . . ."

Subsection B of Paragraph VIII permanently enjoined CHA from using the "pre-clearance" procedure, previously discussed.

The District Court retained jurisdiction of the matter "for all purposes, including enforcement and issuance, upon proper notice and motion, of orders modifying or supplementing the terms of this order." The order has been sup-

plemented by five subsequent orders entered in September 12, 1969; September 15, 1969; October 20, 1969; October 23, 1969 and November 24, 1969, respectively.

Up to this point in the litigation, no appeal was ever taken by either party. The validity of the February 20, 1969 opinion finding of racial discrimination on the part of CHA and of the July 1, 1969 judgment order granting equitable relief in favor of plaintiffs, remain unchallenged and are not the subject of this appeal.

Illinois law requires defendant to submit all sites for public housing to the Chicago Plan Commission and then to the Chicago City Council for approval. (Ill. Rev. Stat. Chap. 24, Sec. 11-12-4.1, and Chap. 67½ Sec. 9). As of May 1970 and continuing to this date, no sites for family dwelling units have been submitted by defendant (CHA) since the entry of the July 1, 1969 order.

Beginning in May 1970, plaintiff's counsel began to make inquiries of defendant as to why new sites had not been submitted so as to determine whether defendants were using their "best efforts" in accordance with the provisions of the July 1, 1969 order. Plaintiffs were informed that defendants wished to delay submission of sites and that allegedly, defendants "did not intend to advise the City Council of sites appropriate for dwelling units . . . prior to the Chicago Mayoralty election scheduled to be held in April, 1971."

As a result of the inquiries by plaintiffs' counsel, a series of conferences with the District Judge leading up to the entry of the order now appealed from were arranged. Five such conferences actually took place. The first was scheduled for June 2, 1970. It was agreed between the parties that they would confer in Judge's Chambers "rather than appear before him in open court on his motion call." The parties further agreed that such conferences would take place without a Court Reporter present. Defendant made on objec-

tion to the procedure for these appearances before the District Judge.

In a May 25, 1970 letter written to plaintiffs' counsel, confirming the arrangements for the June 2 conference, CHA's counsel also stated that CHA would be prepared "to respond fully on June 2 to plaintiffs' request for information" and that CHA was "eager to discuss the broader issues you allude to in your letter of May 20th." It does not seem to be disputed that the "broader issues" referred to were CHA's various proposals for timing of the submission of sites to City Council which would result in deferral of site submission until sometime in 1971.

On June 2, 1970, the first informal conference was held in the Chambers of the District Judge. According to a later transcribed statement by the District Judge, inquiry was made at the beginning of the June 2 conference (and at subsequent conferences) as to whether the parties desired to have a Court Reporter present. Those representing CHA indicated they did not. Likewise, the plaintiffs' attorneys made no request for the attendance of a Court Reporter.

In response to plaintiffs' request for information, defendants submitted a "Chronology of site selection procedure" outlining all steps taken by CHA to acquire sites within the city as well as showing records of correspondence with the Department of Housing and Urban Development (HUD) regarding site development. Also produced were copies of some recent letters to a number of suburban authorities requesting information on possible housing sites in the suburbs. The defendants also submitted a chart indicating progress towards obtaining HUD approval of public housing sites. That chart indicated that prior to the June 2 conference, a total of 263 sites which would generate approximately 1500 family dwelling units had received HUD approval.

The second conference in Chambers was held on June 16, 1970. Judge Austin requested information on procedural steps for site selection. On June 22, CHA submitted a letter in answer to the Judge's request.

A third conference in Chambers was held on June 26, 1970. All five of the CHA Commissioners were present. Chairman Swibel made "comments" regarding timing of site submission which were made a part of the record. Mr. Swibel advised the District Judge that it was imperative that the timing factor be carefully considered and that if that factor were disregarded, it could result in 1) complete stoppage of the urgently-needed housing program; 2) racial tension in the city to the point of strife; 3) acceleration of an already alarming flight to the suburbs by middle class White families; and 4) vigorous protests from the Black community for failure to make housing available to them outside of the city.

Mr. Swibel, on behalf of the Board, further tendered an unequivocal commitment that as soon as sufficient feasible sites had been located outside the city for one third of the dwellings scheduled for the general public housing area, the city sites would be delivered to the City Council for action and the suburban sites would be submitted to the respective governing bodies for their approval.

Mr. Swibel further urged that public housing should be considered as a metropolitan area problem which should be solved on a metropolitan area basis.

Along with Chairman Swibel, Richard Wade, a CHA Commissioner, made a statement to the Court during the June 26 conference. Mr. Wade later incorporated the substance of his comments in a letter to the District Judge dated July 9, 1970. Here he stated his belief that submission of sites to the City Council "before the upcoming campaigns" would have adverse political consequences, and

urged that site submission should be accordingly delayed.

At the June 26, 1970 conference, plaintiffs' counsel argued against deferral of site submission, but did not request any formal order to that effect.

Before turning to the fourth informal conference, one further event should be noted. On July 9, 1970, the Regional Administrator of HUD wrote a letter to the Executive Director of CHA about the status of the approximately 1500 HUD approved Dwelling Units previously referred to in this opinion. The Regional Director expressed concern over possible delay in submitting these sites to the City Council as late as 1971. He indicated that any such delay would be "quite a serious matter" and noted that the Department's ability to hold the reservation of those sites would be involved if such a delay occurred.

At the beginning of the fourth informal conference on July 13, 1970, plaintiffs' counsel submitted a letter and proposed order to the District Judge. The letter objected to CHA's failure to submit any sites to the City Council since the entry of the July 1, 1969 Order and, in the proposed order, moved for the preparation of a comprehensive report containing a full disclosure of all of defendants' efforts to comply with the "best efforts" clause. The proposed order did not formally move for the establishment of a timetable for site submission.

Also at the July 13, 1970 conference, defendants' counsel moved for a continuance so that a Dr. Greeley (who was not present in Court) could make a presentation to the District Judge in favor of CHA's proposal for delay. The District Judge inquired as to the nature of Dr. Greeley's proposed testimony, and then denied the request. At a later transcribed hearing, the District Judge stated that in denying the request, he had indicated his belief that Dr. Greeley's testimony would be repetitive and "a reiter-

ation of views heretofore expressed by the Chairman of CHA (Swibel) and by Mr. Wade of CHA."

At the conclusion of the July 13 conference, the District Judge indicated his intention to enter an order and stated that defendants should not delay any longer in submitting proposed sites to the Plan Commission and the City Council. At this point, defendants' counsel, still voicing no objection to the form of the proceedings thus far, stated that CHA might wish any such order to be in written form. The next day CHA confirmed its request for a written order.

At the fifth conference in Chambers held on July 20, 1970, the District Judge entered a judgment order modifying the "best efforts" provision of the earlier July 1, 1969 order. Proposed sites for public housing were ordered submitted to the Plan Commission and City Council in accordance with a specific timetable. The relevant parts of the July 20, 1970 order upon which this present appeal is based, provide:

> "It having been represented to the Court by the defendant Chicago Housing Authority ("CHA") that CHA presently has a reservation from the United States Department of Housing and Urban Development ("HUD") for the provision of 1500 Dwelling Units (as defined in this Court's judgment order of July 1, 1969; that approximately 260 sites in the General Public Housing Area (as defined in said order of July 1, 1969) have been identified by CHA as appropriate for the construction of an estimated 1580 Dwelling Units; that said sites have been submitted by CHA to HUD and that the same have been approved by HUD; and that the next steps to be taken by CHA to the end that Dwelling Units may be provided as rapidly as possible in conformity with said order of July 1, 1969, are the referral by CHA of proposed sites to the Chicago Plan Commission pursuant to Chapter 24 Sec. 11-12-4.1 Ill. Rev. Stats. 1969 and advice of the

same to the Chicago City Council pursuant to Chapter 67½ Sec. 9 Ill. Rev. Stats. and

"It appearing to the Court that it is desirable that CHA use its best efforts to increase the supply of Dwelling Units as rapidly as possible as provided in said Judgment Order;

"It is hereby ordered, pursuant to Subsection A of Article VIII of the Judgment Order entered herein on July 1, 1969, as modified:

* * *

"II. On or prior to August 20, 1970 CHA shall refer to the Chicago Plan Commission pursuant to Ch. 24, Sect. 11-12-4.1 Rev. Stat. 1969 and on or prior to September 20, 1970 CHA shall advise the Chicago City Council pursuant to Ch. 67½ Sect. 9, Ill. Rev. Stat. 1969 of sites appropriate for the construction in conformity with the provisions of said Judgment Order of July 1, 1969 of not fewer than 1500 Dwelling Units."

On July 20, 1970, CHA moved to vacate the above order. This motion was denied on August 13. The District Court's order was stayed pending this appeal.

A preliminary question facing us is whether the July 20, 1970 order is appealable. Defendants urge that the order is appealable either as a final order or as an interlocutory order granting or modifying an injunction. We agree that the order is appealable as a final order of the District Court under Title 28 U.S.C. § 1291. The order was positive, final, and complete and unequivocally directed CHA to take certain action. *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546; *United States* v. *McWhirter*, 376 F.2d 102 (5 Cir., 1969).

CHA objects first to the procedure leading up to the July 20, 1970 order to submit sites to the City Council and secondly, to the substance of that order insofar as a

timetable was imposed. With respect to the procedure, CHA strongly urges that the order was entered without notice and without a hearing. They contend that the five conferences in Chambers were in effect pre-trial conferences, and point out that there were no docket entries pertaining to them. It is CHA's position that while they were more than willing to discuss the matter of timing of site submission with the District Judge throughout the course of the five in-chamber conferences, they had no expectation until July 13, 1970 that the Judge was going to enter an order imposing a specific timetable.

In some respects it is unfortunate that the court procedure employed throughout these conferences was informal. It is a practice which normally should not be followed. However, in the case at bar, it is evident that the Court followed a procedure that seemed to be in accordance with the wishes of both parties. Moreover, it appears that defendant CHA was very anxious that publicity should not be given to the proceedings, and for this reason declined the Judge's offer to have the conferences transcribed.

After reviewing the record and the briefs of the parties, we have concluded that defendant CHA waived the opportunity to have formal and open hearings before the District Court. CHA not only indicated a preference for informal conferences without the services of a Court Reporter, but it never registered or made known any objection as to the manner in which the five conferences were being conducted. Inasmuch as CHA continuously assented, over a period of two months, to the informal procedures of the conferences, but later, perhaps as a matter of hindsight, concluded such procedures were unwise, we must and do conclude that this point has been waived by defendant CHA and thus, the asserted defense of failure to hold open hearings is not a valid defense in this case.

Although we hold that defendant waived the opportunity for a formal hearing on the question of timing, we note further that much of the substance of the five conferences concerned that very subject. After the first two conferences, the necessary procedural steps for site submission had been outlined for the Court and it had been established that at least for the 263 HUD approved sites, the next step toward erecting housing was submission of the sites to the Plan Commission and City Council. The inquiry then turned to whether there were any convincing reasons why site submission should be delayed. Chairman Swibel's comments articulated specific reasons in favor of deferral and were placed in written form for the Court. Likewise, Commissioner Wade, both orally at the conference and later on in a letter to the Court, argued for delay in submission of sites to the Plan Commission and the City Council. After these presentations, and the earlier conferences all of which totaled several hours, it was not unreasonable for the District Judge to have declined to hear the views of Dr. Greeley, especially when the witness was not in Court at the time the request to be heard was made. We do not think that the Court's refusal to hear Dr. Greeley justifies a special remand by this Court.

For similar reasons we feel compelled to reject CHA's arguments that they lacked notice of the entry of the July 20 order. We grant that no formal request was ever made that a timetable be imposed. But, from an examination of the record and briefs, it is clear that defendants should have been aware that such an order might be entered. It is undisputed that CHA knew from the very beginning that a prime subject of discussion at the conferences would be the matter of timing. In fact, the conferences were arranged as a result of inquiries by plaintiffs' counsel as to why sites were not being submitted to the City Council. CHA expressed a willingness to discuss this matter further in conference and not in open court.

Although CHA argues that this admitted willingness to discuss the timing of site submission did not include an acknowledgment that a "controversial" order would be entered, this claim is refuted by their own attitude at the conferences. Both Chairman Swibel and Commissioner Wade of defendant CHA presented carefully prepared statements in favor of deferred site submission, the very subject of the order of which complaint is made. Both Swibel and Wade were representatives of a defendant which already was under Court order to "affirmatively administer its public housing system in every respect . . . to the end of disestablishing the segregated public housing system . . ." and to "use its best efforts to increase the supply of Dwelling Units as rapidly as possible." Under such conditions and where the move toward informality came at CHA's request, we find the claim of lack of formal notice unpersuasive.

We turn now to CHA's final contention that the District Judge abused his discretion in ordering sites to be submitted to the City Council in accordance with a specific timetable. We find no error in this respect.

The Supreme Court has spoken clearly on the matter of a District Court's discretion in Constitutional cases. In *Griffin* v. *School Board of Prince Edward County,* 377 U.S. 218, it held that a Virginia District Court did not abuse its discretion in refusing to delay the opening of the Prince Edward County schools in accordance with a school desegregation order. The Court commented on the propriety of a timetable order and stated: "An order of this kind is within the court's power if required to assure these petitioners that their constitutional rights will no longer be denied them." (377 U.S. at 233-4).

Consistently, both the Supreme Court and other Federal Courts have held that "abstention" is inappropriate in constitutional cases of this sort and that community hostility

is no reason to delay enforcement of proven constitutional rights. *Coppedge* v. *Franklin Board of Education,* 293 F. Supp. 356 (E.D.N.C., 1968), affd. 404 F. 2d 1177 (4 Cir., 1968); *McNeese* v. *Board of Education,* 373 U.S. 668 (1963); *Holmes* v. *New York City Housing Authority,* 398 F.2d 262 (2 Cir., 1968).

In view of the fact that HUD-approved sites for 1500 Dwelling Units were awaiting submission to the City Council and that the arguments put forward in favor of delaying submission were based on political considerations and community hostility, reasons which had been properly rejected by the lower court in the original litigation, we hold that it was no abuse of discretion for the District Judge to impose deadlines for submission one year after the entry of the original "best efforts" order.

The July 20, 1970 order of the District Judge is affirmed and the cause is remanded to the District Court for submission of sites to the Chicago Plan Commission and to the City Council in accordance with a revised timetable.

AFFIRMED.

No. 18681

KILEY, *Circuit Judge,* dissenting.

I dissent. In my opinion the district court erred in modifying the July 1, 1969 judgment by imposing the specific timetable without the "proper notice and hearing" required by that judgment; and that the error is of sufficient substance to require a remandment to the district court for a "proper hearing" at which both sides may present evidence with respect to a timetable with a complete record upon which we may determine whether the court's discretion had been soundly exercised.

I agree with Judge Duffy that the concurrence of both

parties in the proceedings before the district court constituted a waiver of CHA's right to complain of lack of "formal and open" hearings and a transcript. But I do not see how an agreement to have informal hearings without a reporter on one matter can constitute a waiver of the right to notice of a hearing on another matter. The scant record before us indicates that the purpose of the five informal "conferences" was to obtain information from CHA concerning what action it had taken to conform with the "best efforts" provision of the July 1, 1969 judgment.

Plaintiffs' counsel's July 13, 1968 letter to Judge Austin, with copies sent to counsel for the CHA, requested that CHA be ordered "to cooperate with us in preparing a factual report for the court." Plaintiffs' counsel submitted with the letter a proposed order form. Neither the letter nor the proposed order, however, made mention of a specific timetable, but rather concerned a "non-controversial" report of CHA's required "best efforts." The letter stated that "perhaps everything is being done that can be done" but that could not be determined without further information from CHA.

Clearly in itself the letter and the proposed order submitted with it gave no notice that the imposition of a specific timetable was to be considered. No doubt CHA knew that its performance was under challenge and that in general the question of timing was involved, and it perhaps should have anticipated issuance of a rule to show cause why it had not complied with the order's "best efforts" requirement by submitting the approved sites. But neither that knowledge nor that anticipation is a substitute for a "proper notice" that the July 1, 1969 order was to be modified by setting the specific timetable. There was no "proper notice," as required by the 1969 judgment.

Plaintiff's counsel at the August 13 hearing on CHA's motion to vacate the July 20, 1970 order recalled that he had made an oral motion at the July 13, 1970 conference that "the court express its view that it was high time CHA got down to brass tacks and submitted the already approved sites to the City Council"; and that the court "expressed the view that that was an appropriate thing for CHA to do." But this was not a "proper notice" of a hearing upon a specific timetable and no hearing was had with respect to a timetable. Counsel for CHA requested at the conference a continuance to present evidence of sociologist Dr. Greeley, but the continuance was denied on the basis that the proposed testimony would only be repetitive of what had already been said in written statements addressed to the district court by CHA Chairman Swibel and Commissioner Wade. Dr. Greeley's letter, submitted with defendants' motion to vacate, indicates it is not wholly "repetitive."

I also think that the written statements did not constitute a "proper hearing" on the subject of a specific timetable. Commissioner Wade expressed the view that the submission of sites to the City Council at a time when it could be embroiled as a political campaign issue could result in "less housing." Chairman Swibel stated that "timing" was an essential factor in implementing the 1969 order and that sites should not be submitted to the City Council until arrangements were reached with surrounding suburbs for establishing sites in these areas simultaneously with intra-city sites to prevent flight to the suburbs; and expressed fear of increased racial tension in the city, and complete stoppage of the housing program. It is quite understandable why the CHA would want to present the testimony of experts unconnected with CHA, as "for in-

stance" Dr. Greeley,[1] backed up possibly with sociological data, to support the goals of the 1969 judgment and plans of the CHA. I think the district court erred in considering that proffered testimony irrelevant. And by excluding it from consideration the court, in my view, denied CHA a "proper hearing."

My conclusion therefore is that CHA was denied the "proper notice and hearing," required by the 1969 judgment, with respect to a specific timetable. The question now is whether the denial was of substantial prejudice to CHA. Having in mind that form must not be exalted over substance, my opinion is, nevertheless, that CHA might have been substantially prejudiced by the district court action.

The CHA goal, approved in the 1969 judgment, was a comprehensive Chicago and suburban public housing program. It must be of substantial interest to CHA, as well as to plaintiffs, whether embroilment of public housing sites in a heated political campaign would frustrate the comprehensive program. If that is so, the question of timing of submission of the sites is of importance. The sworn testimony of Swibel, Wade, and Dr. Greeley, as well as other expert testimony, would be relevant on that question. In my opinion, therefore, the CHA should have had an opportunity to persuade the district court, upon a proper record, of the wisdom of a less "rigid timetable"[2] than the one imposed without a "proper notice and hearing."

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[1] Counsel for CHA also requested, in its motion to vacate, that the court hear the testimony of a "Washington expert who will testify that the precise form of procedure set in the July 20 order brought about a complete collapse of public housing efforts in Washington."

[2] CHA, at the August 13 hearing on its motion to vacate, argued that plaintiffs' July 13 letter and suggested order did not give it notice that plaintiffs were asking the court "to impose these rigid time limits." It requested a new hearing to determine whether these timetables were too rigid.

I do not think this view exalts form over substance. This court, in its order granting a stay of the district court order on appeal, referred to CHA's statement that compliance with the timetable "presents a clear danger that there will be no low income housing units built anywhere." This court construed that statement to be "an assertion that there will be irreparable injury to the public." The stay order was granted "because of the importance of the public and constitutional issues involved." This court expedited this appeal because of that "importance."

I would retain jurisdiction and remand for an early hearing, with findings and conclusions certified to us on a complete record suitable for appellate review.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

[Caption omitted]

PETITION FOR REHEARING AND SUGGESTION OF *IN BANC* HEARING

Defendants-appellants (CHA), for the reasons set forth below, petition for reconsideration of the opinion of the Court entered on December 16, 1970, and suggest rehearing in banc because of the importance of the questions presented and because of the lack of uniformity on the "hearing" issue with the December 14, 1970 opinion of this Court in *Skolnick, et al.* v. *Mayor and City Council of Chicago* (No. 18878).

I.

THE COURT'S MAJORITY OPINION MISAPPREHENDS WHAT CHA DID AGREE TO DO AND WHAT CHA DID NOT AGREE TO DO, OVERLOOKS THE APPLICABLE LAW ON "WAIVER", AND APPROVES A SUMMARY ADJUDICATION OF A MATERIAL DISPUTED FACTUAL ISSUE.

The District Judge accurately described the June 2, June 16, June 26 and July 13 conferences as "pretrial conferences" (Transcript July 13, pp. 31-32)*. And this Court's opinion accurately states that CHA agreed with plaintiffs that these pretrial conferences might be (a) in chambers, (b) off the record and (c) unrestricted as to scope of topic. But CHA submits such agreed ground rules at pretrial conferences in complex litigation are the rule rather than the exception. They provide no basis for either the summary adjudication of contested issues or the waiver of a right to a hearing on contested issues.

1. *CHA Never Agreed To Waive Its Right To A Hearing On So Much Of The 1970 Order Amending The 1969 Judgment Order As Imposes A Time Table For The Submission Of Sites To The City Council of Chicago For Its Approval.*

The general purpose of the pretrial conferences below was compliance by CHA with the "best efforts" clause of the Judgment Order of July 1, 1969. Such conferences are for the purposes of—

> "simplification of issues" and the production of an order which, among other things, will reflect "agreements made by the parties as to any of the matters considered, and which limits the issues for trial to

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* For the convenience of the Court, attached as an appendix hereto is a chronology of relevant events.

those not disposed of by admissions or agreements of counsel." Rules 16, F.R.C.P.*

Thus, at the fourth conference, that of July 13, 1970, counsel for plaintiffs proposed an order requiring CHA to file a report. He believed it "should be non-controversial" (A-47-49). He was right. CHA does not object to so much of the order of July 20 as incorporates the gist of plaintiffs' proposed order, and, in fact, the requisite report was filed on the due date.

As of July 13, 1970, the CHA view on the "timing" issue was known. Since plaintiffs asked only for "specific information concerning what CHA has done and plans to do" (A-46), it is not clear just what plaintiffs' position was on this issue. But it may be assumed that the conferences had resulted by July 13 in the isolation of a disputed fact issue —the "best efforts" issue insofar as it involved submission of sites to the Chicago City Council. This Court, we submit, has misapprehended where CHA agreed with the plaintiffs and/or the District Judge and where it was clear there was no agreement. Conferences which illumine a disputed issue are no substitute for the hearing required to resolve it.

2. *The Requisites Of A Waiver By CHA Of Its Right To Notice And A Hearing Prior To Modification Of The July 1, 1969 Judgment Order Are Not Satisfied By The Record Before This Court.*

In *Buffum* v. *Chase Nat. Bank of City of New York,* 192 F.2d 58, (7th Cir. 1951), *cert. den.* 342 U.S. 944 (1952), the issue before this Court was whether defendant, by qualifying in Illinois for the limited purpose of doing trust busi-

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* Appellate Rule 33 says the same thing about a "prehearing conference".

ness, waived its right not to be sued in Illinois except in connection with its trust business. This Court said (p. 61):

> "[Waiver] may be expressed formally or it may be implied as a necessary consequence of the waiver's conduct inconsistent with an assertion of retention of the right. It must be proved by the party relying upon it. And if the only proof of intention to waive rests on what a party does or forbears to do, his act or omissions to act should be so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of his conduct is possible."

This Court in *Buffum* concluded that it would not "attribute to [the defendant] an intent to waive anything other than what it did actually waive * * *". But the majority opinion in this case attributes an intent on the part of the CHA to waive its right to a hearing on modification of the Judgment Order on one issue because it agreed to a modification as to other matters. Waiver is found as to the disputed time table issue despite the fact that from the moment the District Court on July 13 proposed it, CHA objected and sought to bring in a witness and, after entry of the order of July 20, 1970, imposed it, promptly moved formally for a vacation of that order and again sought a hearing.

3. *So Much Of The Ruling Of July 20, 1970, As Imposed A Time Table Amounted To Summary Judgment In The Fact Of A Genuine Issue of Material Fact.*

In *Lynn* v. *Smith*, 281 F.2d 501 (3d Cir. 1960), the issue on appeal was whether the district court erred in dismissing the complaint, *sua sponte*, at the conclusion of a pretrial conference. Reversing, the court said (pp. 506, 507):

> "* * * What the District Court did, in effect, was to grant a summary judgment although neither party had moved for a summary judgment nor had they taken any steps in that direction in accordance with the spe-

cific requirements of Rules 12(b) and 56(c) of the Federal Rules of Civil Procedure, 28 U.S.C.

"The appellate tribunals in the federal judicial system have frequently pointed out to trial courts that * * * summary judgments cannot be granted when there is a genuine issue as to a material fact presented by either of the parties to an action. *Bragen* v. *Hudson News Company, Inc.*, 3 Cir., 1959, 270 F.2d 265; *Alaniz* v. *United States*, 10 Cir., 1958, 257 F.2d 108; *Cameron* v. *Vancouver Plywood Corporation*, 9 Cir., 1959, 266 F.2d 535.

"Further, we are compelled to observe that pretrial conferences are not intended, nor have they ever been to serve as a substitute for the regular trial of cases.

"Finally, mention must be made of the fact that in the course of the pretrial conferences the oral statement of an unsworn 'witness' was received * * *."

* * *

"In our view the receipt of 'oral statements' by 'witnesses' in a pretrial conference opens a Pandora's box not in contemplation by those who so wisely conceived pretrial procedures as a medium of expediting the trial of cases and not as a substitute for the regular trial process."

What happened to the plaintiff in *Lynn* v. *Smith* happened to CHA below—despite the existence of a genuine issue of material fact, at the conclusion of a pretrial conference an order of summary judgment was entered without notice or hearing. This violated the principle of due process, the rules for pretrial conferences and summary judgments, and the text of the 1969 Judgment Order.

CHA has claimed, and does claim, that it has lived up to the letter and spirit of the 1969 Judgment Order's "best efforts" clause. But it, like the plaintiffs in *Skolnick, et al.* v. *Mayor and City Council of Chicago*, decided by this Court

on December 14, 1970 (Case No. 18878), has been denied the opportunity to have its claim "fully litigated".

II.

THE MAJORITY OPINION MISAPPREHENDS DOCUMENTS TO THE PREJUDICE OF CHA.

CHA submits that the majority opinion reflects misapprehension of key documents in the record and each instance has resulted in material prejudice to the cause of CHA.

1. *The HUD Letter Of July 9, 1970.* The majority (pp. 6, 7), referring to a July 9, 1970, letter from the Regional Administrator of HUD to the Executive Director of CHA about the status of the HUD approved dwelling units, states:

> "The Regional Director expressed concern over possible delay in submitting these sites to the City Council *as late as 1971.* He indicated that *any such delay* would be 'quite a serious matter' and noted that the Department's ability to hold the reservation of those sites would be involved *if such a delay occurred*" (Emphasis added).

The majority thus finds in the record a possibility that a delay of approval by the Chicago City Council to *"as late as 1971"* (e.g., Jan. or Feb. 1971) would jeopardize the program involving about 1,500 units spread over 263 sites.

What the letter in question actually said about the kind of a delay that might put the whole program at risk is:

> "*Informally,* we have been *led to understand* that the sites may not be submitted to the City Council *until late in 1971*" (Emphasis added).

CHA submits that the difference between a possible delay to "as late as 1971" and a possible delay "until late in 1971"

is significant: it could be almost twelve months. Moreover, nowhere in any document before this Court on this appeal —including the evidentiary affidavit of the counsel for plaintiffs—is there a basis for the suggestion that the 263 sites might not be submitted to the City Council for approval until "late in 1971". In short, the basic premise of the author of the letter from HUD was false and the majority opinion has overlooked that important point.

Apart from the problem resultant from misapprehension of its contents, the evidentiary use of such a document as against CHA* underscores the difficulty caused CHA by the unusual nature of the proceedings below. The author from HUD stated that his official concern was based upon what unidentified persons at HUD had been "led to understand" —"informally". Because CHA had no opportunity to examine the author of that letter, one can only conjecture and speculate as to who it was that led persons connected with HUD to that understanding, when that understanding was implanted, where, and how.

2. *The Wade Letter Of July 9, 1970.* The majority (p. 6) sums up the letter of July 9 from Richard Wade, a CHA Commissioner, to the District Judge as follows:

> "***[Wade] stated his belief that submission of sites to the City Council 'before the upcoming campaigns' *would have adverse political consequences,* and urged that site submission should be accordingly delayed" (Emphasis added).

This statement misapprehends Wade's letter. The only adverse consequences suggested by Wade in his letter if sites were submitted before "the upcoming campaigns" were

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* It was put into the record as an exhibit to the affidavit of plaintiff's counsel's affidavit on August 13, 1970 (A-20, 21).

consequences adverse to the goal of more public housing. Wade said (A-44):

> "***it [is] my judgment that submission of the sites at the present time would make public housing the central issue of upcoming campaigns and it [is] my fear that the *ulltimate results would be that less housing would be built.* There is abundant historical evidence that resistance to public housing in white areas has been used by political candidates for partisan political purposes. It would be unfortunate if your historic decision got embroiled in a political contest where there was not adequate defense of either public housing or your decision.
>
> "****I would not like to see this great opportunity for integrated housing jeopardized by temporary political considerations" (Emphasis added).*

The majority's misapprehension of what Wade said undoubtedly contributed to the Court's conclusion (p. 12) that "political considerations" were a basis for CHA's arguments in favor of delaying submission of the sites. As the Wade letter clearly states, CHA's position was *not* based upon "political considerations" (whether this or that candidate would be aided or hurt by the submission of sites during a political campaign), but rather upon the fact that CHA must take into account that each proposed site must be approved by Chicago aldermen: if they vote "No" on a proposed site there will be no public housing on that site. If one's interest is in the construction of more public housing in Chicago, it seems obvious that aldermen should vote at a time most opportune for a "Yes" vote. All Professor Wade suggested was that campaign time was not such an opportune time.

The majority states (p. 12):

> "* * * community hostility is no reason to delay enforcement of proven constitutional rights. *Coppedge*

v. *Franklin Board of Education,* 293 F. Supp. 356 (E.D.N.C. 1968), aff'd 404 F.2d 1177 (4 Cir., 1968); *McNeese* v. *Board of Education,* 373 U.S. 668 (1963); *Holmes* v. *New York City Housing Authority,* 398 F.2d 262 (2 Cir., 1968)."

The defendants in each of those cases had the power—however hostile the community—to grant the plaintiffs relief: each school board defendant had the power to desegregate the schools in its district and the housing authority defendant had the power to abolish discriminatory practices in the rental of units it controlled. But CHA does not have the power to build public housing in the City of Chicago or elsewhere without approval of the local government. What CHA builds it will build in accordance with the 1969 Judgment Order. But without local government approval it can build nothing.

Finally, it must be remembered that Professor Wade is just one Commissioner of the CHA who presented one Commissioner's opinion supplementing the official position of the Commission. The official position of the CHA (A-38-43) is that the problem of public housing must be solved, as is contemplated in the July 1, 1969, Judgment Order, on a metropolitan basis.

3. *The Polikoff Letter of July 13, 1970.* The last of the four pretrial conferences on July 13, 1970, opened with the submission of a letter and form of proposed order from counsel for plaintiffs to the District Judge and to the General Counsel of CHA. The majority (p. 7) says that the "letter *objected* to CHA's failure to submit any sites to the City Council since the entry of the July 1, 1969 order: and that the accompanying "proposed order did not *formally* move for the establishment of a time table for site submission" (emphasis added).

CHA submits that the letter did not constitute an *objection* to the failure, thus far, to submit sites to the City Council: that unquestioned fact simply was a basis for plaintiffs' request, as the majority opinion accurately notes (p. 7), "for the preparation of a comprehensive report containing a full disclosure of all of defendants' efforts to comply with the 'best efforts' clause".*

The majority's reference to the fact that plaintiffs on July 13, 1970, did not "formally move" for the establishment of a time table for site submission implies, we submit, that there had been an *"informal* motion" to that effect. The text of the letter and the proposed order rebut that implication. Omitting the paragraphs referring to "background" and those setting forth what information plaintiffs wanted, plaintiffs' July 13 letter reads as follows:

> "Against this background, let me set out the following facts:
>
> 1. Since the entry of the decree CHA has not submitted one site for new low-income family housing to the City Council for approval—and, of course, therefore, has not begun the construction of one new dwelling unit for low-income families" (A-45).
>
> "Unless the best efforts provision of the decree is to be rendered meaningless, we need specific information concerning what CHA has done and plans to do. *Perhaps everything is being done that can be done, but we cannot know this if we do not have the information. If more should be done than is being done, we cannot make intelligent recommendations to the Court without knowledge.*
>
> "Therefore, pursuant to the 'best efforts' provision of the decree, we ask that CHA be directed to cooperate with us in preparing a factual report for the Court. Attached is a form of such an order. We do not

* Such a report was filed on August 14, 1970.

necessarily ask, however, that such an order be entered; we believe that an informal request from you to CHA should suffice.

"I am sorry I have not been able to prepare and deliver this letter earlier. However, it really does nothing more than reduce in writing the oral request we made at our last meeting in your chambers. *Moreover, it should be non-controversial.* Accordingly, I hope it will be possible to act upon our request promptly, if not this morning then shortly thereafter" (A-46-47, emphasis added).

Thus the document submitted by plaintiffs on the very day that the Judge decided to impose a time table shows that plaintiffs were not suggesting, formally or informally, the imposition of a time table, they were—in fact—candidly admitting that so far as they knew after three pretrial conferences: "Perhaps everything is being done that can be done* * *" (A-46).

The minority opinion (p. 13) takes note of the assertion of counsel for plaintiffs—in argument on August 13, 1970 (Tr. p. 13):

"* * * we did make an oral motion in the presence of counsel for CHA that the Court express its view that it was high time CHA got down to brass tacks and submitted the already approved sites to the City Council * * *"

However, the only support in the record for this August 13 argument of counsel for plaintiffs is found in his volunteered testimonial affidavit in which he says that at the *June 26,* 1970, pretrial conference:

"Counsel for plaintiffs made a statement as to the impracticability and undesirability of further deferral of advice to the City Council of sites appropriate for Dwelling Units" (A-20).

Thus, it appears that, whatever the views of plaintiffs on June 26, 1970, by July 13, 1970, (after considering the CHA resolution and the statement of its Chairman submitted on June 26, 1970, and the July 9, 1970 letter of Wade), so far as plaintiffs knew: "Perhaps everything is being done that can be done***" (A-46). As of July 13, 1970, therefore, the record shows that CHA had every reason to believe that plaintiffs were as willing to defer submission of the sites to the City Council as CHA was willing to provide plaintiffs with the information they desired.

4. *The Polikoff Affidavit Of August 12, 1970.* Below, plaintiffs' counsel filed an affidavit in opposition to the August 12 motion of CHA to vacate the July 20 order and to set the contested matters involved for a hearing. This was relied on by the District Judge (Tr. Aug. 13, p. 17) and misapprehended by this Court (p. 4) to the prejudice of CHA. Among other things, plaintiffs' counsel, as affiant, said:

> "The first of such conferences [June 2, 1970] was held following the advice to counsel for plaintiffs from the Chairman of CHA *to the effect* that CHA did not intend to advise the Chicago City Council of sites appropriate for dwelling units*** prior to the Chicago mayoralty election scheduled to be held in April 1971" (A-18, emphasis added).

This August assertion as to what the Chairman of the CHA supposedly said some time in May, 1970, is not hinted at in any of the documents written by the affiant prior to the date of the affidavit. See Polikoff letters of May 18, May 20 and July 13, 1970 (A 22-25, A 45). Also, the August 12 assertion by plaintiffs' counsel as to what was supposedly said to him by the CHA Chairman sometime prior to the first conference, is contradicted by what plaintiffs' counsel wrote on July 13, the date of the fourth conference:

> "Perhaps everything is being done that can be done*** (A-46).

If plaintiffs were convinced that CHA, come what may, was resolved upon a delay until after the April 1971 mayoralty election they had no basis for such a temperate statement—plaintiffs should have initiated contempt proceedings.

At the August 13, 1970 argument before the District Judge, CHA objected both to the above and other evidentiary portions of the Polikoff affidavit (Tr. pp. 7, 24, 15). But the Trial Judge left no doubt that he accepted as true the "evidence" of plaintiffs' counsel during the following colloquy:

> "The Court: Well, it was suggested by the Chairman that a better time politically would be after the 15th of April, 1971.
>
> "Mr. Polikoff: I think that is correct, your Honor.
>
> "The Court: And I think that is disclosed in your affidavit" (Tr. p. 18, See also Tr. p. 17).

CHA Counsel stated then that such reliance upon an affidavit of an adversary attorney was "outrageous" (Tr. p. 24) and that is still the view of CHA. By this position CHA does not attack the affiant's credibility, reliability or memory. If the testimony contained in the Polikoff affidavit of August had been introduced and tested in the usual fashion, a fuller version of the alleged May conversation would have been before the district court and this Court; had this been the case, most of the contradictions that bristle in this record between what plaintiffs' documents contemporaneous with events reflect and what plaintiffs later argued probably would have vanished.

The majority of this Court, misapprehending the nature of the affidavit in question, states:

> "Plaintiffs were informed that defendants wished to delay submission of sites and that allegedly, defendants 'did not intend to advise the City Council of sites appropriate for dwelling units . . . prior to the Chicago mayoralty election scheduled to be held in April, 1971' ". (p. 4)

Thus, over CHA's objection and without any opportunity for CHA to cross-examine the affiant or to produce testimony to the contrary, both the majority of this Court and the district court have given credence to an untested and prejudicial testimonial statement from the attorney for a party litigant. CHA submits that such reliance upon such a document constitutes a clear denial of due process to CHA.

CHA, therefore, submits that this Court has misapprehended important documents and that CHA has been seriously prejudiced thereby. Each of these matters, we submit, is sufficient to provide an independent basis for this petition for rehearing and that the matter be considered in banc.

CONCLUSION

In conclusion, a word about "delay". If the contested issue had been heard, say in late August, any appeal from the result, if expedited as this one was, could have been decided long before December 16: There would have been a regular record and the findings of fact would have been governed by Rule 52(a). The irregular procedure below, commencing on July 13, 1970, when the Trial Judge announced his determination to impose a time table, has produced confusion and a divided Court. Of course, during the flurry of procedural motions attendant to CHA's appeal (See Appendix), CHA has remained bound by all of the provisions of the 1969 Judgment Order, including the "best efforts" clause, so there has been no pause in the effectiveness of the basic decree.

For all of the above reasons, CHA submits that its petition for rehearing and its suggestion of an in banc rehearing should be granted.

Respectfully submitted,

PATRICK W. O'BRIEN
Patrick W. O'Brien
WATSON B. TUCKER
Watson B. Tucker

Attorneys For Defendants-Appellants

Of Counsel:

Kathryn M. Kula
General Counsel, CHA
Mayer, Brown & Platt

APPENDIX

DATE	DESCRIPTION
June 2, 1970 June 16, 1970 June 26, 1970	Pretrial conferences in Judge Austin's chambers.
July 13, 1970	Pretrial conference in Judge Austin's chambers, service of Polikoff letter (A-45-49), announcement by Judge of intention to amend the order of July 19, 1969 by imposing a time table for submission of sites to stay counsel.
July 20, 1970	Entry of order from which this appeal is taken.
August 10, 1970	Filing of the appearance of Patrick W. O'Brien and Watson B. Tucker as additional attorneys for CHA.
August 11, 1970	Filing and service of three motions on behalf of CHA: 1. Motion to vacate the order of July 20, 1970 and to set the matters referred to in said order for hearing. 2. Motion to extend the time periods set forth in the order of July 20 until disposition of CHA's motion to vacate, etc. 3. Motion to extend time for the filing of an appeal from the order of July 20 until disposition of CHA's motion to vacate, etc.
August 13, 1970	Argument of counsel and entry of order denying each of CHA's August 11 motions.

DATE	DESCRIPTION
August 14, 1970	Pursuant to an agreed order the filing by CHA in the District Court—under seal until further order of Court—the report called for by paragraphs A and B of Part I of the order of July 20, 1970.
August 14, 1970	Filing of the notice of appeal.
August 18, 1970	CHA's motion in the District Court for a stay pending appeal and an entry of an order denying same.
August 18, 1970	CHA's motion in this Court for a stay pending appeal.
August 19, 1970	Order of this Court granting a stay pending an appeal, ordering that the appeal be expedited and setting the schedule for briefs and oral argument.
August 20, 1970	Motion of Plaintiffs To Reconsider and Vacate Granting of Stay.
August 21, 1970	Order of this Court denying Plaintiffs' motion to reconsider and vacate granting of a stay pending appeal.
September 9, 1970	Filing of brief and appendix of CHA.
September 23, 1970	Filing of the brief of Plaintiffs.
September 30, 1970	Filing of the reply brief of CHA.
October 6, 1970	Oral argument.
December 16, 1970	Opinion of this Court.
December 17, 1970 (A.M.)	Plaintiffs' Motion For Immediate Issuance of Mandate, Etc.
December 17, 1970 (P.M.)	Memorandum of CHA In Opposition To Motion of Plaintiffs For Immediate Issuance Of Mandate, Etc.
December 18, 1970	Order of this Court denying Plaintiffs' Motion For Immediate Issuance Of Mandate, Etc.
December 30, 1970	Filing of this Petition for Rehearing.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Thursday, February 18, 1971.

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. OTTO KERNER, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*

DOROTHY GAUTREAUX, et al., *Plaintiffs-Appellees,* No. 18681 vs. THE CHICAGO HOUSING AUTHORITY, a corporation and ALVIN E. ROSE, Executive Director, *Defendants-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, a vote of the active members of the court was requested, and a majority of the active members of the court having voted to deny a rehearing and rehearing *en banc,*

IT IS ORDERED that the petition for rehearing and the petition for rehearing *en banc* be, and the same are hereby denied.

[Caption Omitted]

MOTION TO VACATE ORDER OF JULY 20, 1970 AND TO SET THE MATTERS REFERRED TO IN SAID ORDER FOR HEARING

(Filed August 11, 1970)

Defendants move that the Order of July 20, 1970, in this cause be vacated and that the matters involved and referred to in said Order be set for a hearing after "proper notice and motion."

In support of the motion defendants state:

1. This Court's Judgment Order of July 1, 1969, provides that orders in this cause after that date would be entered "upon proper notice and motion." The order of July 20, 1970, was not entered pursuant to such notice and motion. That order was entered after five informal conferences in chambers of which no record was made and defendants were never advised in writing and on the record, as provided for in the Judgment Order of July 1, 1969, of the grounds upon which plaintiffs moved for the relief they sought.

2. The Judgment Order of July 1, 1969, provides that orders in this cause after that date would be entered after the "presentation of relevant information." However, defendants were not provided with an adequate opportunity to present such information prior to the July 20, 1970 order. Moreover, the limited opportunity that was afforded defendants to present relevant information was off the record. Defendants, by the terms of the July 1, 1969 Judgment Order necessarily must be afforded an adequate opportunity to make a presentation prior to the entry of further orders. To be adequate, such an opportunity—both for the benefit of the Court and the litigants—must include, among other things, the right to present to the court a reasonable number of witnesses under circumstances which provide a record of the proceedings, witnesses, for instance, such as Rev. Dr. Andrew M. Greeley, Program Di-

rector, National Opinion Research Center, University of Chicago, whose relevant views are summarized in the letter attached hereto as Exhibit A. The proceedings prior to the entry of the order of July 20, 1970, did not provide such an adequate opportunity.

3. The order of July 20, 1970 denied defendants due process of law in that it was entered without affording the defendants an opportunity to be heard.

4. The order of July 20 is specifically based upon Subsection A of Article VIII of the Judgment Order of July 1, 1969, the "best efforts" provision. In legal effect, the CHA has been found to have not complied with the "best efforts" provision and this finding has been entered without affording the CHA a reasonable opportunity to present evidence supporting its contention that it has complied with the letter and spirit of the Judgment Order of July 1, 1969.

5. The order of July 20 is an appealable order but the right of defendants to appeal has been seriously prejudiced by the failure of the court to provide the CHA with an opportunity to make a proper record upon which to base an effective appeal.

6. For the reasons stated in the above five paragraphs, the order of July 20, 1970, constitutes an abuse of discretion. It is an abuse of discretion for the further reason that it represents an unwarranted interference with the necessary discretionary decision making powers of defendants about the details of how best to increase the supply of housing for low income families "as rapidly as possible," and to do so in conformity with the July 1, 1969 Judgment Order.

KATHRYN M. KULA
General Counsel
Chicago Housing Authority

PATRICK W. O'BRIEN
One of the Attorneys
for Defendants

Of Counsel:
MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
S T2-0600

EXHIBIT A

July 25, 1970

Miss Kathryn M. Kula, General Counsel
Chicago Housing Authority
55 West Cermak Road
Chicago, Illinois 60616

Dear Miss Kula:

I regret that I was unable to attend the conference in Judge Austin's chambers on the morning of July 13 in connection with the Gautreaux case, as you and Prof. Richard Wade requested. You will recall that in our telephone conversation on July 8, I indicated that I would be available on any day of the following week. However, had I appeared, I would have made this statement on behalf of the Chicago Housing Authority:

This statement is made within a context created by four assertions:

(1) It is socially and morally desirable to provide humane, integrated public housing for the less affluent of all races as quickly as possible.

(2) Some methods of providing such housing are likely to be more successful than others. Some methods may in fact be so counter-productive as to defeat partially or totally the goal.

(3) There is good reason to think that the failure by CHA to build integrated public housing beyond the city limits of Chicago will frustrate the goal stated in proposition 1.

(4) I will not discuss here the political feasibility of public housing in white neighborhoods in the city only. However, in passing I note my conviction that the choice is not between metropolitan public housing or

public housing in Chicago only, but rather one between metropolitan public housing or no public housing.

In support of assertion #3 I adduce the following assumptions:

There is a strong trend in American cities for the white population to desert the central city for the suburbs so that the city may well become a black ghetto and the suburbs a white ghetto. While recent census material shows that the picture may not be quite as serious as was previously thought, there still can be no doubt about the flight of the white population from the central cities. Under such circumstances neighborhoods which are integrated by public housing projects may remain integrated for relatively brief periods of time since many of the white residents of such neighborhoods may avail themselves of the opportunity to move to all white suburbs. Quite apart from the indirect effect on public housing and services of an eroding tax base, such an exodus would be directly unfavorable to the prospect of maintaining integrated neighborhoods. I do not argue that public housing in all white neighborhoods will be itself cause such an exodus, but I do argue that there is considerable reason to think that, unless countermeasures are taken, such housing would accelerate the pace of the exodus.

There is no way to prevent American citizens from moving from a neighborhood they deem unsatisfactory if they decide to move. Movement from an integrated neighborhood may be stupid, ignorant, immoral and bigoted, but telling people that will not stop them from moving once they have made up their minds to do so. Neither will suits or injunctions.

There is in white neighborhoods massive fear of integrated housing. Some of this fear is based on bigotry, some on reality factors, and some on a very complex mixture of both. The fear can be reduced by intelligent and appropriate action by public authorities.

I presume that the CHA will engage in vigorous educational activity to reduce the fear and to control in so far as is possible exodus from newly integrated neighborhoods. But there should be no mistake about the difficulty of this talk.

Most "fear reduction" activity will be wasted if those who live in site neighborhoods think that a move to the suburbs will free them from the possibility of having to live in integrated neighborhoods.

On the other hand if it is clear that the border of the city of Chicago is no barrier to the spread of integrated housing, one important motivation for moving is eliminated and a powerful countermove is introduced for attempting to "live with" integrated housing and make it work. Indeed the location of integrated sites throughout the metropolitan region would, I think, turn out to be an extremely important means of reducing racial fears in the city. If the "threat" is perceived as being equally shared by all and not disportionately born by a few, it seems both "fairer" and also somehow less serious.

Therefore I heartily endorse and am in complete agreement with the policy and program conceived by the CHA Board of Commissioners that the most effective way to carry out the federal order requiring it to build integrated housing is to develop sites simultaneously in the city and the suburbs. Public announcement of such a program should make for "fear reduction" and serve more readily to win community acceptance of integrated housing.

Very truly yours,

Andrew M. Greeley
Program Director, National
Opinion Research Center,
University of Chicago

[Caption Omitted]

ANSWER OF PLAINTIFFS TO THREE MOTIONS OF DEFENDANTS

(Filed August 12, 1970)

Without supporting affidavits the defendant Chicago Housing Authority ("CHA") has served three motions as follows:

> (1) To vacate the order entered herein on July 21, 1970 (the "Order") and to set another hearing concerning its subject matter;
>
> (2) To modify the terms of the Order (by extending its time periods) until disposition of the motion to vacate; and
>
> (3) To extend the time for appealing the Order (to give time to consider the motion to vacate).

The three motions will be discussed in Parts I, II and III hereof, respectively.

I. The Motion to Vacate is Baseless and an Affront to Judge Austin

The grounds for the motion to vacate are that, (A) the Order was not entered "upon proper notice and motion," (B) CHA was not "provided with an adequate opportunity to present [relevant] information," or with an "opportunity to be heard," or with a "reasonable opportunity to present evidence," or with an "opportunity to make a proper record," and (C) the Order constitutes an abuse of the Court's discretion.

Although the motion make many assertions of fact, it is not verified, or supported by an affidavit, or even manually signed by the CHA counsel who participated in the conferences before Judge Richard B. Austin which are referred to in the motions.

Attached hereto and made a part hereof is an affidavit of one of plaintiffs' counsel who did participate in such conferences. The affidavit discloses that grounds (A) and (B) for the motion to vacate are baseless and that ground (C) is plainly without merit. The affidavit discloses, indeed, that it is an affront to Judge Austin (who clearly went out of his way to give CHA the fullest opportunity to be heard and to present whatever evidence it desired) to assert that he somehow denied CHA its rights. It appears from the affidavit that the Order was entered upon proper notice and motion pursuant to a procedure agreed to by the parties, that CHA was given a full hearing with full opportunity to be heard, to present evidence and to make a record, and that in view of the nature of the judgment order entered herein on July 1, 1969, the lapse of time since that date and the evidence submitted during the conferences, some of which is recited in the Order, the entry of the Order was well within the discretionary powers of the Court.

II. The Motion to Modify is Without Merit.

The motion to modify the terms of the Order rests on the validity of the motion to vacate. If the latter is summarily denied, as it should be, the motion to modify must plainly be denied as well.

III. The Motion to Extend the Time to Appeal is Without Merit, and the Court Lacks Power to Grant It.

The motion to extend the time to appeal should be denied for the same reason as the motion to modify. In addition, such a motion may only be granted "upon a showing of excusable neglect." Rule 4(a), Federal Rules of Appellate Procedure. Here there is not even an effort to make such a showing.

CONCLUSION

These motions are but the latest chapter in a sorry story. For three years CHA fought an adjudication that it had

violated the plaintiffs' constitutional rights. After the final judgment order was entered hereon on July 1, 1969, CHA's public relations staff trumpeted CHA's willingness to comply and its decision not to appeal. That order included the following provision:

> "CHA shall use its best efforts to increase the supply of Dwelling Units as rapidly as possible in conformity with the provisions of this judgment order and shall take all steps necessary to that end, including making applications for allocations of federal funds and carrying out all necessary planning and development."

After fourteen months of dilatoriness by CHA (and of patience by Judge Austin), CHA was finally ordered to take affirmative action to comply with that provision. Its reasons for not doing so were fully presented and considered by Judge Austin. They amounted to reliance on discredited political considerations (see *Gauteraux* v. *CHA*, 296 F.Supp. 907, 914-15), and, now, upon an alleged interference with CHA's "discretion." One is reminded of the wearisome story of school desegregation decisions. For example,

> "In this instance, this Court is being asked to weigh the constitutional rights of the plaintiffs against the administrative convenience of the Board of Education and to rule in favor of the latter. Merely to state the proposition is to reject it." *Taylor* v. *Board of Education of New Rochelle*, 195 F.Supp. 231, 238 (S.D.N.Y. 1961, aff'd 294 F.2d 366 (CA2, 1961).

It would be a travesty if CHA were not now, at long last, obligated to proceed affirmatively as Judge Austin has ordered it to do.

Respectfully submitted,

Alexander Polikoff
109 North Dearborn Street
Chicago, Illinois 60602

[Caption Omitted]

AFFIDAVIT

(Filed August 12, 1970)

STATE OF ILLINOIS }
COUNTY OF COOK } ss.

ALEXANDER POLIKOFF, being first sworn, says that he is one of the counsel for plaintiffs in the above cause, that he has personal knowledge of the matters and things set forth herein, and that if sworn as a witness would testify to them as so set forth.

1. Preceding the entry of the order of July 20, 1970 by the trial judge herein, the Honorable Richard B. Austin, five conferences concerning the subject matter of said order were held in Judge Austin's chambers on June 2, 1970, June 16, 1970, June 26, 1970, July 13, 1970 and July 20, 1970, respectively.

2. At each of such conferences counsel for the defendant Chicago Housing Authority ("CHA") was present, participated fully, and made no objection to the form or manner thereof or to the notice therefor.

3. The first of such conferences was held following advice to counsel for plaintiffs from the Chairman of CHA to the effect that CHA did not intend to advise the Chicago City Council of sites appropriate for Dwelling Units (as the same are defined in the judgment order entered herein on July 1, 1969) prior to the Chicago mayoralty election scheduled to be held in April, 1971. Following such advice the first such conference was set by agreement of counsel for both parties and Judge Austin. Counsel for CHA was notified by letter dated May 20 that the first conference was set for the morning of June 2, 1970, and she confirmed that June 2 was satisfactory by a letter dated May 25, 1970 in which she said,

> "We also are eager to discuss the broader issues you allude to in your letter of May 20. However, I can see no reason why this matter cannot await discussion with Judge Austin on June 2 . . ."

Such letter also said:

> "Your inquiry as to what action CHA has taken to comply with the 'best efforts' provision of the order requires an extensive response. We will be prepared to respond fully on June 2nd in Judge Austin's chambers."

True copies of such letter of May 25, 1970, and related letters are attached hereto.

4. Each of the four subsequent conference dates was set by agreement of counsel and Judge Austin, without objection by any party, to hear further agrument and evidence respecting CHA's proposed deferral of advice to the Chicage City Council of proposed sites for Dwelling Units

5. At the conference of June 2, 1970, CHA submitted to Judge Austin a document entitled "Chronology of Site Selection Procedures" dated June 2, 1970, a true copy of which is attached hereto.

6. At the conference of June 16, 1970, Judge Austin requested CHA to furnish certain information concerning the procedural steps followed in acquiring sites. Such information was supplied to Judge Austin by letter dated June 22, 1970, a true copy of which is attached hereto. The conference was then continued at the specific request of counsel for CHA to June 26, 1970 because, she said, the Chairman of CHA wished to make a presentation to Judge Austin.

7. At the conference of June 26, 1970, the five Commissioners of CHA, Charles R. Swibel, Theophilus Mann, John J. Masse, Letitia Nevill and Professor Richard C. Wade,

were present in addition to counsel. Mr. Swibel made a statement, a true copy of which is attached hereto. Counsel for CHA read and submitted to Judge Austin a resolution adopted by the Commissioners on June 25, 1970 identified as Resolution No. 70-CHA-105, a true copy of which is attached hereto. Commissioner Wade made a statement as to the political implications of advising the City Council of sites for Dwelling Units, and thereafter wrote a letter to Judge Austin, dated July 9, 1970, a true copy of which is attached hereto. Counsel for plaintiffs made a statement as to the impracticability and undesirability of further deferral of advice to the City Council of sites appropriate for Dwelling Units. At the conclusion of the June 26 conference the matter was again continued until July 13 for the specific purpose of enabling CHA to present whatever additional evidence it wished.

8. At the commencement of the conference of July 13, 1970, a letter from counsel for plaintiffs to Judge Austin, dated July 13, 1970, was delivered to Judge Austin and to counsel for CHA, a true copy of which letter is attached hereto. Counsel for CHA requested a further continuance for the purpose of introducing testimony of one Dr. Greeley, who was not then present in court. Prior to July 13 no request had been made to Judge Austin for a continuance for such or any other purpose. Judge Austin heard the statements of counsel for CHA as to the subject matter of Dr. Greeley's proposed testimony, stated that such testimony would be repetitive of arguments previously made by Professor Wade and other CHA representatives, and decline to further continue the proceedings. Counsel for plaintiffs referred Judge Austin to a letter from the Department of Housing and Urban Development to CHA respecting the timing of CHA's advice to the Chicago City Council of sites for Dwelling Units. A true copy of such

letter from Francis D. Fisher, Regional Administrator, to Mr. C. E. Humphrey, Executive Director of the CHA, dated July 9, 1970, is attached hereto.

9. At the conclusion of the conference of July 13, 1970 Judge Austin stated that in his view an order in form similar to that proposed by counsel for plaintiffs and attached to his letter dated July 13, 1970 was appropriate, that CHA should not defer any longer the necessary steps to acquire appropriate sites for Dwelling Units, and that advice to the Chicago City Council with respect thereto should be given by September 1, 1970. Counsel for CHA stated that CHA might prefer that a direction to such effect be embodied in a written order and that she would advise counsel for plaintiffs within 24 hours as to whether such a written order was desired. The parties and Judge Austin agreed to continue the matter to July 20, 1970, for the purpose of signing an order providing for a written report by CHA and, if desired by CHA, an order providing for advice to the Chicago City Council.

10. Counsel for CHA advised counsel for plaintiffs on or about July 14 or 15, 1970 that a written order respecting advice by CHA to the Chicago City Council was desired and on July 20, 1970, over the objections of CHA as to substance but not form, Judge Austin signed the order which was entered herein on July 20, 1970.

11. The conferences held on the five dates listed in paragraph 1 above lasted many hours in the aggregate. No restriction of any kind was imposed upon the form or content of the evidence to be presented. The two sessions of June 26, 1970 and July 13, 1970 were specifically scheduled for the purpose of permitting CHA to present whatever evidence it desired. At no time during any of the conference sessions was any objections to the procedure, or

to the presence or absence of any notice or motion, raised by counsel for CHA.

Further affiant sayeth not.

ALEXANDER POLIKOFF
Alexander Polikoff

Subscribed and sworn
to before me this
12th day of August,
1970.

KAREN F. WINER
Notary Public

BUSINESSMEN FOR THE PUBLIC INTEREST
109 North Dearborn Street
Suite 1001
Chicago, Illinois 60602
(312) 641-5570

May 18, 1970

Miss Kathryn M. Kula, General Counsel
Chicago Housing Authority
55 West Cermak Road
Chicago, Illinois 60616

Dear Kay:

This will confirm our conversation of yesterday in which I requested copies of the following:

1. The materials submitted by CHA to HUD showing CHA's proposed site plans for the current 1,500 unit family housing reservation. If the submissions to

HUD (I understand there are two of them) do not include related information such as the precise location of the site, zoning status of the sites, the number of units proposed at each site, etc., I would like to have that information as well.

2. Any related planning information respecting the proposed sites which was not included in the submissions to HUD, for example, CHA staff recommendations or other memoranda relating to the proposed sites.

3. CHA's plans for the "community acceptance" effort which we have previously discussed, including the full plan of which you have previously provided me a summary and any written material so far prepared pursuant to this plan by CHA or its hired consultants in this regard.

4. Any other documents which may evidence the action so far taken by CHA to comply with the subsection A of Section VIII of the judgment order entered July 1, 1969 (the "best efforts" provision), including particularly any contractual or other written arrangements which have been entered into by CHA with respect to the siting of public housing in areas outside the City of Chicago.

5. Site location information concerning the recently approved new program for approximately 1,500 elderly family units (locations of projects and number of units), and the current status of this program.

As we discussed, I wish this information for the purpose, among others, of enabling us to prepare a mutually agreed upon statement of the current factual situation for joint submission by us to Judge Austin in the context of raising with the Judge the question of the procedure to be followed in light of our two recent meetings. Since we are anxious to proceed promptly, and you have advised me that you will be out of town on Wednesday and Thursday of this

week, I have asked you to indicate to me by the end of the day today whether you will supply me with the requested information. If you are unable to respond affirmatively, I have asked you to join me in appearing before Judge Austin before the end of the day tomorrow, so that we may present to him (before you leave town) the question of whether we are entitled to the requested information under the circumstances.

Sincerely yours,

Alexander Polikoff,
Executive Director

ALP:eo

Miss Kathryn M. Kula
General Counsel
Chicago Housing Authority
55 West Cermak Road
Chicago, Illinois

May 20, 1970

Dear Kay:

This will confirm our conversation on Monday as follows:

1. You advised me that you were not in a position to respond to the request for information in my May 18th letter to you because Mr. Swibel felt that the matter required discussion with the Commissioners and he was leaving town for the rest of the week.

2. You were unable to comply with my request that you join me in appearing before Judge Austin on Tuesday because you were otherwise engaged (and would yourself be out of town until Friday).

3. You did agree to join me before Judge Austin next Monday afternoon, but we both agreed that it would perhaps be preferable to see the Judge in chambers rather than appear before him in open court on

his motion call. You also said it was possible that by Monday afternoon you might have received permission to supply me with the requested information.

Following our conversation I spoke with Judge Austin's clerk and learned that the Judge is on trial and would be unable to see us in chambers for any appreciable length of time other than at 9:00 A.M. on May 20 (a scheduled pretrial conference had been cancelled) or at 9:00 A.M. Tuesday morning, June 2. I was of course forced to reject the May 20 date because of your being out of town.

I have accepted the June 2 date and you may mark your calendar accordingly. That may be an appropriate occasion to discuss with the Judge the broader questions which have been presented by our recent conversations, but I am unwilling to wait until then for a decision on the question of our being entitled to information. Indeed, I wish the information far enough in advance of June 2 so that we may have an agreed-upon statement of facts to hand to the Judge at that time. Accordingly, I apparently have no alternative but to seek an order in open court requiring that CHA supply the requested information. However, since I have agreed with you that I will not do anything before the afternoon of Monday, May 25, I will not formally move for such an order until the motion call at 10:00 A.M. on Tuesday, May 26. I hope that the matter can be resolved satisfactorily and informally before then but I wish by this letter to formally notify you that unless there is such a resolution I will appear before Judge Austin at 10:00 A.M. on Tuesday, May 26 and move for the production of the information requested in my letter to you of May 18.

Sincerely yours,

ALEXANDER POLIKOFF,
Executive Director

ALP:co

(May 25, 1970)

Mr. Alexander Polikoff
Businessmen for the Public Interest
109 North Dearborn Street, Suite 1001
Chicago, Illinois

Re: Gautreaux v. CHA
66 C 1459

Dear Mr. Polikoff:

This is to acknowledge receipt of your letter of May 20th received at CHA on May 21st and given my attention Friday, May 22nd.

With regard to your request for information and documents as outlined in your letter of May 18th, CHA will make available to you the items called for in paragraph 3, 4 and 5 as follows:

(3) Two documents from Community Programs, Inc. The one dated February 9, 1970 contains their recommendations for a public housing information program. I previously supplied you with a summary of this document. The second memorandum dated May 19, 1970, is a summary report of the status of their activities.

(4) Your inquiry as to what action CHA has taken to comply with the "best efforts" provision of the order requires an extensive response. We will be prepared to respond fully on June 2nd in Judge Austin's chambers. CHA has not entered into "any contractual or other written arrangements" with respect to the siting of public housing in areas outside the City of Chicago. However, we are in communication with seven suburban housing authorities with respect to locating sites beyond the city limits.

(5) Site selection information concerning the recently approved new program for 1,500 elderly units as contained in Commissioners' Resolution No. 70-CHA-59, copy enclosed. An ordinance calling for City Council

approval was introduced in the Council on May 20, 1970. Plan Commission Hearings are scheduled for May 28, 1970.

With regard to the materials and information called for in paragraph 1 and 2 pertaining to "CHA's site plans for the current 1,500 unit family housing reservation" and related detailed information in connection therewith, it is the Authority's position that the release of such information is premature and not consistent with Judge Austin's order of July 1, 1969. Section VII A of that order provides that such information is to be filed with the court and copies served on you within ten (10) days after such locations are approved by the Board of Commissioners of CHA. As of this date the Commissioners have not acted on any sites. Indeed, staff has not yet submitted any sites to the Commissioners for their consideration, since staff is still in the process of site selection.

Concerning your statements that (1) Judge Austin will be unable to see us in chambers until June 2, 1970 at 9:00 A.M.; and (2) that you "apparently have no alternative but to seek an order in open court (on Tuesday, May 26) requiring that CHA supply the requested information," this is to advise that I am unable to appear on that date.

We are also eager to discuss the broader issues you allude to in your letter of May 20th. However, I can see no reason why this matter cannot await discussion with Judge Austin on June 2nd and am at a loss to understand why one week should make that much difference to you particularly now that the Authority is willing, on a voluntary basis, to supply you with the data indicated above.

Very truly yours,

Kathryn M. Kula
General Counsel

KMK:hn
Enclosure
cc: Judge Richard B. Austin

EXHIBIT 1
June 2, 1970

THE CHICAGO HOUSING AUTHORITY

Chronology of Site Selection Procedures

1/21/69 CHA requested from HUD program reservation of 10,000 units—5,000 elderly, 5,000 family.

3/6/69 CHA wrote HUD requesting immediate approval of application for 10,000 units.

4/1/69 CHA Chairman and Executive Director met with Winnetka Human Relations Committee and other interested citizens regarding site of public housing in suburban areas surrounding Chicago.

4/7/69 CHA Chairman and Executive Director met with the Executive head of the City of Evanston (Robert C. Wheeler, Community Development Group Manager) regarding public housing site in Evanston.

4/16/69 CHA Executive Director and Director of Engineering met with Executive Director of Northeastern Illinois Planning Commission (NIPC) regarding available information on sites for public housing in suburban areas. CHA was advised that NIPC's application to HUD for funding a six-county land survey was in process.

6/30/69 Memorandum for the United States filed with the court makes following statement on p. 17: "We can promptly make funds available for a survey to locate available and suitable sites . . ."

7/1/69 Order entered in Gautreaux case.

7/2/69 Telegram to Secretary Romney—CHA requested

$50,000 to make site survey and approval of previously requested unit allocation.

7/14/69, 7/18/69 — Two meetings with HUD, Cook County Housing Authority, State of Illinois, Real Estate Research—R.E.R. retained by HUD to develop criteria for a site survey covering Cook County (including Chicago) and portions of Lake, Kane, McHenry, DuPage and Will Counties.

7/29/69 — Letter from Secretary Romney responding to CHA's telegram of 7/2/69—No decision re re-request for unit allocation or funds for site survey.

10/8/69 — CHA received approval from HUD of program reservation: 1,500 family units and 1,500 elderly units.

10/69 — CHA started search for sites in General Housing areas (See memo attached which details extensive work involved.)

12/69 — CHA requested a loan of $50,000 of State Grant Funds from State Housing Board to cover costs of site selection and preparation of development programs for federal unit allocation. State Housing Board approval received.

12/17/69 — Another meeting with HUD on criteria for survey.

12/17/69 — CHA made first submission of family sites to HUD. (See line 1 of attached chart.)

12/29/69 — CHA made second submission of family sites to HUD (See line 2 of attached chart); also submitted elderly sites.

12/69 Chairman of CHA together with some of the directors of Number Two Chicago Dwellings Association met with representatives of La Grange, Hinsdale, Burr Ridge, Western Springs, Pleasant Dale, and local school districts at a meeting in the West Suburban YMCA in La Grange to open discussions regarding development plans for the Bridewell prison farm property and the provision of some low-rent public housing at that location.

1/20/70 CHA received final copy of criteria for survey prepared by Real Estate Research.

2/4/70 Further discussions with HUD on site survey—how to proceed now that criteria were complete.

2/11/70 Meeting on site survey cancelled by HUD and not rescheduled.

2/19/70 HUD approval of elderly sites received.

3/3/70 CHA received HUD response re family sites—those approved, not approved and reasons, with recommendations for additional sites. (See line 3 of attached chart.)

3/70 CHA inspected and analyzed sites suggested by HUD and continued search for additional sites.

4/23/70 CHA board approved 7 sites for the elderly (high rise buildings—1,595 units)

4/70 HUD finalized plans for funding Housing Analysis to be undertaken by NIPC—low and middle income housing in 6 counties in Metropolitan area. [Apparently this is in lieu of funding Cook County Housing Authority or CHA for site survey outside of Chicago.]

4/27/70 CHA decided to communicate with other Housing Authorities to enlist their cooperation in the placement of public housing units in the suburbs; communicated with the Office of Housing and Buildings for necessary information.

4/29/70 CHA ordinance for approval of elderly sites introduced into City Council and referred to Committee on Planning and Housing.

5/1/70 CHA submitted additional family sites to HUD. (See line 4 of attached chart.)

5/70 HUD gives NIPC "go ahead" to start housing survey in Metropolitan area. NIPC recommendations for target areas due 2/28/71, to provide basis "for more detailed and longer range housing site proposals to be made in 1971 and thereafter."

5/22/70 CHA sent letters to 7 suburban housing authorities requesting meeting to discuss available sites for public housing.

5/26/70 CHA wrote the Department of Local Affairs (Successor to the State Housing Board) and the Illinois Housing Development Authority enlisting their cooperation in finding suitable sites in areas outside Chicago not represented by local housing authorities.

6/1/70 CHA received HUD response re family sites submitted on 5/1/70—those approved and not approved. (See line 3 of attached chart.)

Attachments: (1) Chart indicating site submissions.

(2) Memorandum detailing site selection procedures.

CHICAGO HOUSING AUTHORITY
Inter-Office Memo

To Kathryn M. Kula
General Counsel

Date 5/25/70

Subject: Site Selection Procedures

Responding to your request for information relating to the procedures utilized by this Department in connection with selection of sites for family units in the General Public Housing area, the following outlines the activities of my staff to identify suitable sites and prepare necessary data for submission to HUD:

1. Examined 21 volumes of Sanborn maps covering those areas of the City located in the General Public Housing area. Sanborn maps, showing location of existing structures, is a prime source for identifying vacant land in the City of Chicago. These maps contain the most current information available to our knowledge.
2. Compiled a list of all apparently vacant properties having a frontage of 50 feet or more.
3. Went into the field and personally viewed each listed property, which involved locating by street address approximately 1,500 scattered pieces of property. Sites were eliminated from the original list if no longer vacant, were being utilized for side yards or parking lots, or because the prevailing usage of adjacent property was not compatible with family type housing.
4. The remaining sites were then analyzed for zoning compliance and whether zoning changes, if required, were feasible.
5. Calculations then were made to estimate number of units per location both from point of view of zoning limitations and good planning. Example: a parcel 50′ x 142′ located in an R5 district would permit a

17 unit structure. However, good planning would permit only 6 units.

6. All census tracts in which properties were located were analyzed to determine compliance with the 15% limitation on public housing in a given census tract.
7. Estimates were made of total land costs, per parcel, and resulting estimates of land costs on a per dwelling unit basis (Reference—Olcott's Land Value).
8. As sites are located and identified by street addresses, legal descriptions for each site have to be prepared.
9. No site was eliminated because of land costs.
10. Tract book records currently are being studied to determine ownership of the sites involved.

G. W. LEBSOCK
G. W. Lebsock
Director of Engineering

GWL:hn

CHICAGO HOUSING AUTHORITY
Inter-Office Memo

To K. Kula
General Counsel

Date 1/16/70

Subject: Report of Site Selection Activities

On October 8, 1969, we received in the Engineering Department a copy of the HUD Program Reservation authorizing CHA to initiate action to develop 1,500 family housing units.

Members of this staff were instructed to scour all volumes of Sanborn maps for the entire area of Chicago which was located in the General Public Housing Area. The Uptown Urban Renewal Area was not included since DUR will provide site locations and criteria for that community.

From the Sanborns, staff prepared a list of all vacant properties having a frontage of 50 feet or more. Staff then visited each listed property and deleted all those that were not available for development by virtue of the fact that they had been developed subsequent to the latest Sanborn sheet, were parking lots, gas station property, etc. No potential site was deleted because of location or estimated cost.

Staff then prepared a final listing of possible sites, made a preliminary estimate of acquisition cost and calculated the number of units that could be developed under present or proposed zoning.

As of this date, we feel we have a listing of all vacant land (50 foot frontage or more) in the General Public Housing Area that is suitable for housing development. This has been transmitted to the Department of Development and Planning to ascertain compliance with the Comprehensive Plan of Chicago and to identify sites, if any, that are being considered for development by other agencies, i.e., Board of Education, Park District, etc. The list has also been given to HAA for preliminary site review relative to per unit acquisition costs. As soon as we receive responses from these two organizations, a final list will be prepared for submission to the CHA Board of Commissioners, Federal Court and City Council.

The listing as it now stands will accommodate some 2,017 units. We have not yet determined how many will be stricken due to non-compliance with Judge Austin's order relative to proximity to each other and/or resulting in an excess of 15% of available units in a Census Tract.

This briefly outlines our activities to date. If you need specific information, it can be provided.

G. W. Lebsock
G. W. Lebsock
Director of Engineering

EXHIBIT 2

June 22, 1970

Judge Richard B. Austin
U. S. District Court
219 South Dearborn Street
Chicago, Illinois

Dear Judge Austin:

This report is being submitted pursuant to your request in our brief conference the morning of June 16th.

1. The status of site selection by CHA and HUD approvals is set forth on the attached chart, a copy of which I left with you on June 2nd.

2. Before proceeding with land acquisition of said sites, the following actions must be taken:

(a) Thirty days prior to action by the Commissioners authorizing acquisition, the sites must be submitted to the Chicago Plan Commission. Chapter 24, Section 11-12-4.1, Ill. Rev. Stats. 1969.

(b) CHA staff must submit to the Board of Commissioners the sites in question with sufficient information to enable it to determine suitability of the sites for acquisition and development for family public housing. Note: As of this date specific location or identification of sites has not been submitted to the Commissioners, either formally or informally.

(c) Upon consideration of the sites proposed by staff the Commissioners must adopt a Resolution authorizing and directing staff to obtain City Council approval and proceed with acquisition of the properties either by negotiated purchase or eminent domain proceedings.

(d) A site ordinance must be prepared which includes legal descriptions and maps for each of the

sites for which City Council approval is being requested.

(e) The ordinance must then be forwarded to the Clerk of the City Council for introduction to the Council.

(f) Upon introduction of the ordinance, it will probably be referred to the Committee on Planning and Housing. The Committee usually holds public hearings and then makes its recommendations to the full Council.

(g) The City Council must adopt an ordinance approving the sites for acquisitions by CHA.

The specific question posed to CHA at this time, as I understand it, is how long does CHA estimate it will take to complete items (a) through (e) above. The Executive Director advises that his estimate is from sixty to ninety days after the action in step (a) is taken.

Very truly yours,

Kathryn M. Kula
General Counsel

KMK:hn

Attachment

cc: Mr. Alexander Polikoff
CO Files
Legal

CHA Submittals to HUD	Submittal Date	No. of Sites	No. of Units (CHA Estimate)	No. Sites Approved by HUD	No. of Units (CHA Estimate)	No. Sites Requiring Zoning Change	No. Sites with Correct Zoning	No. Units Requiring Zoning Change	No. Units with Correct Zoning
1	12/17/69	169	1,197	105	867	72	33	548	319
2	12/29/69	123	615	81	348	20	61	98	250
(HUD submittal to CHA)	3/3/70	54	Not estimated	26*	156	10	16	98	58
3	5/1/70	61	325	51	209	5	46	37	172
		407		263	1,580	107	156	781	799

*On HUD List. 26 of 54 sites were only ones approvable or eligible.

COMMENTS BY CHARLES R. SWIBEL, CHAIRMAN
The CHICAGO HOUSING AUTHORITY
June 26, 1970

The objective of the order entered by this Court on last July 1st is clear, and one with which the Chicago Housing Authority is in complete accord.

If that objective is to be achieved, however, I believe it is imperative that the TIMING factor be carefully considered in the implementation of the order. Disregard of that factor could result not only in a nullification of that objective but in

(1) complete stoppage of the urgently-needed public housing program;

(2) racial tension in the city to the point of strife;

(3) acceleration of an already alarming flight to the suburbs by middle-class white families;

(4) vigorous protests from the Black community for failure to make housing available to them outside the city.

The Authority's efforts to locate feasible sites have already been documented by our General Counsel and our "good faith" efforts to date have been conceded by the Counsel for the plaintiffs. The Court has also been made aware that it is the Authority's recommendation that the public announcement of new public housing locations should cover the total package of sites—both city and suburban. I would appreciate consideration of my reasons for this request.

First, however, the Board of Commissioners of the Authority has authorized me to tender this Court an unequivocal commitment that as soon as sufficient feasible sites have been located outside the city for the one-third of the dwell-

ings scheduled for the general public housing area, as provided for in the order, the city sites will be delivered to the City Council for action, and the suburban sites will be submitted to the respective governing bodies for their approval.

This course of action is dictated by what the Board believes are valid reasons.

The Board is convinced that it is in the best interests of the community and the public housing program to handle this entire issue as a METROPOLITAN AREA problem which should be solved on a metropolitan area basis.

If the new allocation of public housing—coupled with its racially mixed tenancy—is placed entirely within the city, it is almost inevitable that there will follow a decampment to the suburbs by the families whose properties are adjacent to the newly-announced sites.

In our search for city sites, extreme care was taken to make certain that SOME public housing would be built in every ward in the general public housing area. The Authority was counting on assistance from HUD and its funding of site surveys to identify feasible locations outside the city limits. To submit a partial list of sites at this time would almost inevitably lead to the Authority's being responsible for wholesale block-busting. A combined list of city and suburban sites will make it obvious that flight is futile—that there will be no place to which people can run to escape either public housing or integration. To make a meaningful impact, the program must be submitted as a total package.

CHA, while looking for city sites, had been relying on HUD's promises to fund a suburban site survey. The "Chronology of Site Selection Procedures" submitted to you by Miss Kula on June 2nd details the intolerable delays

occasioned by HUD on that score. It wasn't until last month that we learned HUD was funding the Northeastern Illinois Planning Commission to undertake the job. It wasn't until a few weeks ago that we learned the NIPC time table for identifying specific sites was 1971 and thereafter.

In these circumstances, the CHA Board has decided to fund an immediate search for feasible locations in surrounding communities. In the interest of saving time, this identification process will take place even before we have formalized agreements with other local housing authorities or other local governing bodies.

The Authority has already met with community people in Winnetka, Evanston, and areas surrounding the Bridewell Farm property; with the Northeastern Illinois Planning Commission; and with the Cook County Housing Authority, the Illinois Housing Development Authority, the Department of Local Government Affairs of the State of Illinois, and the Elgin Housing Authority, for the purpose of discussing this subject. A meeting with the DuPage County Housing Authority is scheduled for July 16th.

If the Court wishes, I shall be glad to have reports of our progress in these negotiations submitted on any time-basis deemed desirable: bi-monthly, monthly or quarterly.

I would like to add that I have discussed these problems with numerous members of both the white and black community, and I can corroborate that the consensus indicates deep concern for these problems.

This stated policy of the Board to place public housing simultaneously in the city and suburbs is concurred in and endorsed by the Integration Committee consisting of Theophilus M. Mann, Judge George N. Leighton, Bishop Louis

H. Ford, Very Rev. Comerford J. O'Malley and Carlos C. Ruiz.

The announcement of a positive program, encompassing both the city and suburbs, will make it clear that public housing and integration must be accepted in all communities throughout the metropolitan area. The Board is of the opinion that by so doing, the CHA will have made the intent of the order demonstrable fact.

THE CHICAGO HOUSING AUTHORITY

RESOLUTION NO. 70-CHA-105

WHEREAS, the Commissioners of the Chicago Housing Authority having considered the many and complex sociological and economic factors involved in the siting of low-rent public housing have concluded as a matter of policy that the interests of the community and the public housing program will best be served by developing sites simultaneously in the city and suburban areas; that the difficulties involved in housing the underprivileged are the problems of the Metropolitan Area and must be solve on a metropolitan area basis; and

WHEREAS, the Integration Committee, consisting of Judge George N. Leighton, Carlos Ruiz, Executive Director of the Puerto Rican Congress of Chicago, the Rev. Comerford J. O'Malley, Chancellor of De Paul University, Bishop Louis H. Ford, St. Paul Church of God in Christ, and Theophilus M. Mann, Attorney and Vice-Chairman of the Chicago Housing Authority, voted to concur, endorse and approve the position of the Commissioners of the Chicago Housing Authority that public housing sites for familes

of low income be placed simultaneously in the City and the suburbs; and

WHEREAS, Judge Austin's order of July 1, 1969 provided that of the aggregate number of dwelling units to be constructed and/or leased by Chicago Housing Authority, one-third of the units may at the option of the Authority, be planned for and located in the General Public Housing Area of Cook County, outside the city limits; and

WHEREAS, staff has diligently pursued its search for suitable sites in the General Public Housing Area within the City of Chicago while at the same time has been conferring with HUD, the Cook County Housing Authority and the Illinois Housing Development Authority with the objective of securing the funding of a survey for sites in the Metropolitan area; and

WHEREAS, the Commissioners have only recently learned that HUD has decided to fund the Northeastern Illinois Planning Commission (NIPC) to make this survey, apparently in lieu of funding the Chicago Housing Authority or the Cook County Housing Authority; and

WHEREAS, upon being informed that the said survey by the Northeastern Illinois Planning Commission will not be completed until late in 1971, the Commissioners have instructed staff to undertake CHA's own search for suitable sites in the metropolitan area outside the city and to undertake any and all negotiations with local communities and housing authorities as required by law; and

WHEREAS, to date CHA representatives have met with community people in Winnetka, Evanston, and areas surrounding the Bridewell Farm property and with the Northeastern Illinois Planning Commission, the Cook County Housing Authority, the Illinois Housing Development Au-

thority, the Department of Local Government Affairs of the State of Illinois and the Elgin Housing Authority;

THEREFORE, BE IT RESOLVED BY THE CHICAGO HOUSING AUTHORITY THAT it is hereby declared to be the policy of this Board that the current federal allocation of low-rent family public housing units be utilized for the simultaneous location of such units in suburban communities of the Chicago metropolitan areas as well as in the City proper, all in accordance with the limitations provided in Judge Austin's order of July 1, 1969;

THAT the Commissioners do hereby authorize the expenditure of preliminary planning funds to continue the search for suburban sites and staff is instructed to proceed not only with negotiations with other housing authorities but with the identification of specific sites in the metropolitan area beyond Chicago's City limits.

CHICAGO HOUSING AUTHORITY

July 9, 1970

Judge Richard B. Austin
U. S. District Court
219 South Dearborn Street
Chicago, Illinois

Dear Judge Austin:

At our hearing before you with the ACLU on June 26, I raised the question of the political implications of introducing sites in the City Council for public housing in white areas. I suggested that my responsibility as a Commissioner of the Authority was to get as much low-income

housing built as possible within our jurisdiction. I also indicated that it was my judgment that submission of the sites at the present time would make public housing the central issue of upcoming campaigns and it was my fear that the ultimate result would be that less housing would be built. There is abundant historical evidence that resistance to public housing in white areas has been used by political candidates for partisan political purposes. It would be unfortunate if your historic decision got embroiled in a political contest where there was not adequate defense of either public housing or your decision.

I do not want you to think that my position was dictated by any reservations about your decision or the ultimate submission of sites by CHA to the City Council. I am enclosing an article which I wrote almost three years ago which contains my fears about housing in political campaigns. This was written about the election of 1966 and, as you know, the climate is now worse than it was then. I hope you will have an opportunity to read this article before our next meeting. I realize political judgments are also difficult to make and I indeed may be wrong. But historically there have been few issues as politically explosive as this question. I would not like to see this great opportunity for integrated housing jeopardized by temporary political considerations.

Respectfully,

Richard C. Wade
Commissioner

Enclosure
cc: Mr. Alexander Polikoff

* * *

BUSINESSMEN FOR THE PUBLIC INTEREST
109 North Dearborn Street
Suite 1001
Chicago, Illinois 60602
(312) 641-5570

July 13, 1970

The Honorable Richard B. Austin
United States District Juge
United States Courthouse
219 S. Dearborn Street
Chicago, Illinois

Re: *Gautreoux* v. *CHA, 66 C 1459*

Dear Judge Austin:

It is now one year since the decree was entered on July 1, 1969. It is clear that housing for low-income families is desperately needed in the metropolitan area, and that the objectives of the decree cannot be achieved without a substantial increase in the supply of such housing. It was for this reason that the decree required CHA to "use its best efforts to increase the supply of Dwelling Units as rapidly as possible in conformity with the provisions of this judgment order and [to] take all steps necessary to that end, including making applications for allocations of federal funds in carrying out all necessary planning and development."

Against this background, let me set out the following facts:

1. Since the entry of the decree CHA has not submitted one site for new low-income family housing to the City Council for approval—and of course, therefore, has not begun the construction of one new dwelling unit for low-income families.

2. Neither plaintiff nor (I believe) the Court have been informed in any meaningful way as to plans CHA may have for supplying low-income family housing beyond the 1,500 unit reservation presently available from HUD. Obviously, the 1,500 units—even if they were available for occupancy tomorrow—would not begin to meet the need or satisfy CHA's "best efforts" obligation.

3. Neither we nor the Court have been given any information as to CHA's efforts, if any, to use the "Turnkey" method of supplying housing. (See the full page ad of the New York City Housing Authority printed in the New York Times on June 30, 1970, a copy of which is enclosed.)

4. We have no information concerning CHA's efforts, if any, to have made available to it for low-income housing obsolete commercial and industrial areas of the City which are appropriate for such use. (See the quotations from the Comprehensive Plan of the City of Chicago which are enclosed herewith.)

5. We have no solid information respecting CHA's arrangements, if any, for supplying low-income housing in suburban areas. (At our request we were furnished with some general information from Miss Kula which, for example, refers to a meeting with persons from Winnetka over a year ago and contains no further information as to developments or opportunities in Winnetka, if any.)

Unless the best efforts provision of the decree is to be rendered meaningless, we need specific information concerning what CHA has done and plans to do. Perhaps everything is being done that can be done, but we cannot know this if we do not have the information. If more should be done than is being done, we cannot make intelligent recommendations to the Court without knowledge.

Therefore, pusuant to the "best efforts" provision of the

decree, we ask that CHA be directed to cooperate with us in preparing a factual report for the Court. Attached is a form of such an order. We do not necessarily ask, however, that such an order be entered; we believe that an informal request from you to CHA should suffice.

I am sorry I have not been able to prepare and deliver this letter earlier. However, it really does nothing more than reduce to writing the oral request we made at our last meeting in your chambers. Moreover, it should be non-controversial. Accordingly, I hope it will be possible to act upon our request promptly, if not this morning then shortly thereafter.

Very truly yours,

ALEXANDER POLIKOFF
Alexander Polikoff

ALP:eo
Encs.
cc: Miss Kathryn Kula

* * *

[Caption Omitted]

ORDER

This matter coming on to be heard on the presentations of the parties, and the Court being fully advised, IT IS HEREBY ORDERED THAT,

Pursuant to Subsection A of Article VIII of the Judgment Order entered herein on July 1, 1969, as modified, the defendant Chicago Housing Authority ("CHA") shall prepare a written Report to be submitted to the Court by August 15, 1970, as to the action taken and to be taken by it to comply with said Subsection. Such Report shall include

detailed information concerning, but need not be limited to, the following:

A. Action taken prior to the date of Report respecting—

1. Identification of sites for Dwelling Units which do not require zoning changes.

2. Identification of sites for Dwelling Units which require zoning changes, and action taken to secure such changes.

3. Employment of the "turnkey" method of production of Dwelling Units.

4. Agreements with other official bodies, including other housing authorities, to increase the supply of Dwelling Units.

5. Proposals, requests, etc., submitted by CHA to the Department of Housing and Urban Development for additional "reservations" for Dwelling Units, or relating to other action designed to increase the supply of Dwelling Units.

B. Future Plans

A detailed statement, including information in the categories listed under "A" above, of the number of Dwelling Units to be built, and the anticipated locations thereof, over the 12, 24 and 36 month periods following the date of the Report, including a statement as to how such production and location of Dwelling Units is to be achieved.

To the extent the future plans referred to under "B" above have not been prepared, CHA is hereby directed, pursuant to said Subsection A of Article VIII, to promptly prepare the same.

CHA is hereby further directed to confer with counsel for the plaintiffs during the preparation of such Report and to make full disclosure to them of all matters necessary

or appropriate to the preparation of the same to the end that such Report shall be as comprehensive and detailed as possible and shall constitute a statement respecting the matters to be covered thereby which has been agreed to by the parties. Any issues of privilege or confidentiality shall be promptly submitted to the Court for resolution to the extent the parties are unable to settle the same among themselves.

ENTER:

.....
United States Judge

July .., 1970